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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ADIDAS AMERICA, INC., an Oregon corporation;
4 and ADIDAS AG, a foreign entity,

5 Plaintiffs,

6 v.

21 Civ. 5615 (JSR)

7 THOM BROWNE, INC., a Delaware corporation,

8 Defendant.

9 New York, N.Y.
10 January 11, 2023
9:00 a.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge
14 -and a Jury-

15 APPEARANCES

16 KILPATRICK TOWNSEND & STOCKTON LLP
Attorneys for Plaintiffs
17 BY: R. CHARLES HENN, JR.
H. FORREST FLEMMING III

18 WOLF GREENFIELD & SACKS, PC
19 Attorneys for Defendant
20 BY: ROBERT MALDONADO
HARLEY LEWIN
21 BRYAN CONLEY
TONIA SAYOUR
22 MARIE McKIERNAN

23 ALSO PRESENT:
NITA GRAY, adidas paralegal
24 MICHAEL PUSTERLA, Thom Browne paralegal
25

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(Trial resumed; jury not present)

THE COURT: Just before we begin, two things.

One is there is a request from the jury that we go without a break until the conclusion at 12, or maybe even earlier at the rate we're going. That seems fine.

I think everyone recognizes -- but I'll hear from you later if you disagree -- that laches is ultimately, the defense of laches is ultimately for the court. It's an equitable defense. And for that reason, you may recall that in the very first version of the draft of the preliminary instruction that I gave to you, I didn't mention laches at all. And then defense counsel said, well, we would like to have laches in there. And I thought, well, OK, we can take an advisory verdict from the jury on that issue since, in any event, we're going to have one trial that covers everything.

But in thinking about it further, I think we're already imposing too much on the jury without burdening them with that. So I am inclined to tell them that laches is something that will not be decided by them and, therefore, we'll revise the charge accordingly.

Also, this is not something I thought about previously, but I thought about it last night. I'm wondering whether loss profits is also a judge issue, not a jury issue, in which case I would not give that to the jury either. So this, I think, would simplify things for the jury. It would

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1 just be the two substantive counts plus damages and actual
2 damages.

3 But anyone disagree with that?

4 MR. HENN: Well, on behalf of us, you are correct that
5 laches is an equitable defense. The court should rule on it.
6 We have no issue with you simply taking that issue, now that
7 you've heard the evidence, and making that decision.

8 Profits is a little different in the way the trademark
9 cases have dealt with it. Yes, it is an equitable remedy.
10 However, the case law is pretty clear that in cases where there
11 is both legal and equitable relief sought from the -- well,
12 from the case, and the parties try those issues to the jury,
13 the jury goes ahead and awards both amounts. The court can
14 then, after the verdict, adjust that as it sees fit because the
15 statute specifically says that the profits award is to be
16 subject to the principles at equity.

17 THE COURT: Well, we'll discuss that further then.
18 The jury is obviously anxious to get going. I am going to take
19 laches from the jury.

20 But let me hear first from defense counsel.

21 MR. MALDONADO: So we believe as to laches that there
22 are some underlying factual issues that the jury should
23 consider and perhaps even decide, including when, as your Honor
24 had raised previously, when the defendant should have known
25 about -- the plaintiff should have known about defendant's

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activities.

So we believe that we want to be able to include that as part of our story, the laches defense.

THE COURT: That may be, but it's not --

Do you disagree that laches is for the court to decide?

MR. MALDONADO: I do not disagree with that, your Honor.

THE COURT: All right. I'm going to take it from the jury.

All right. Let's bring in the jury.

(Continued on next page)

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Steckel - Cross

1 (Jury present)

2 THE COURT: Let's get the witness back on the stand.

3 Good morning, ladies and gentlemen. Thank you, as
4 always, for your promptness.

5 You may recall from my preliminary instruction that
6 there was a reference to the issue of delay, and you may even
7 recall that legally, at some times, was called the defense of
8 laches of delay. You've heard some evidence relating to that,
9 whether the plaintiff delayed too long in bringing this case,
10 and so forth.

11 After consultation with counsel it has been determined
12 that that is not an issue that you need to decide. So that's
13 no longer a part of the case. When you get my detailed
14 instructions tomorrow, you'll see that it's no longer the case.
15 So far as you're concerned, the case is simply going to be the
16 plaintiff has proven infringement and/or dilution, and if so,
17 what actual damages you need to award for that. But delay is
18 no longer part of the case.

19 So I just wanted to alert you to that, and you'll see
20 in much more detail my instructions tomorrow.

21 So go ahead, counsel.

22 CROSS-EXAMINATION

23 BY MR. HENN:

24 Q. Morning, Dr. Steckel. I just want to pick up where we left
25 off yesterday and clarify a few things about what you are not

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Steckel - Cross

1 offering an opinion on here in court.

2 All right?

3 A. I understand.

4 Q. I understand you are not offering any opinion that
5 Thom Browne's use of these stripe designs does not create a
6 likelihood of confusion?

7 A. That is correct, I am not.

8 Q. You are not offering any opinion what Thom Browne has done
9 does not create a likelihood of dilution?

10 A. That is correct, I am not.

11 Q. You are not offering any opinions on the similarity of the
12 Three-Stripe Mark to the Thom Browne stripe designs?

13 A. That is correct, I am not.

14 Q. You're not offering any opinions concerning Mr. Poret's
15 survey or Dr. Joachimsthaler's methodology of his survey?

16 A. That is correct, I am not.

17 Q. You are also not offering any professional opinion in this
18 case that adidas is not a strong brand?

19 A. That is correct, I am not.

20 Q. And you're also not offering any opinions on whether the
21 Three-Stripe Mark is famous or not?

22 A. Correct.

23 MR. HENN: No further questions.

24 THE COURT: Redirect?

25 MS. SAYOUR: Nothing further, your Honor.

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Steckel - Cross

1 THE COURT: Thank you very much. You may step down.
2 Please call your next witness.
3 (Witness excused)
4 MR. MALDONADO: The defense calls Basil Imburgia.
5 MR. HENN: We need a quick sidebar on this one.
6 THE COURT: All right.
7 (Continued on next page)

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Steckel - Cross

1 (At the sidebar)

2 THE COURT: By the way, on the subject we were just
3 going over, I will have a much further discussion, but I have
4 not yet decided whether the facts relating to delay are still
5 something defense counsel can talk to the jury about as bearing
6 on some of the other issues in the case.

7 So I'm not ruling out that possibility.

8 MR. MALDONADO: Thank you.

9 THE COURT: OK. But we'll discuss that further.

10 Yes?

11 MR. HENN: The issue we have -- and this has just come
12 to our attention -- last week on Friday, all day there was a
13 bald man sitting in the back of the courtroom. We have no idea
14 who he was. As he was leaving the courtroom, we noticed that
15 on his briefcase he had the logo of FTI. That is the company
16 that this witness works for.

17 We looked up this guy online, and it turns out he
18 works with the next witness. We can't think of any good reason
19 why he was listening to testimony last week.

20 THE COURT: Well, it doesn't matter unless he
21 discussed the testimony.

22 MR. HENN: That's why I wanted to raise it.

23 THE COURT: So is he still in the courtroom now?

24 MR. CONLEY: No. He was our graphics person. He has
25 nothing to do with our knowledges expert.

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Steckel - Cross

1 MR. HENN: Then I don't have a concern.

2 THE COURT: OK.

3 (Continued on next page)

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1 (In open court)

2 THE COURT: Let's get the witness on the stand.
3 Please remain standing and raise your right hand.

4 BASIL ANTHONY IMBURGIA,

5 called as a witness by the Defendant,

6 having been duly sworn, testified as follows:

7 State your full name and spell it for the record.

8 THE WITNESS: Yes. My name is Basil Anthony Imburgia
9 and it is B-a-s-i-l and the last name is I-m-b-u-r-g-i-a.

10 THE COURT: Counsel.

11 MR. CONLEY: Before we begin the examination, your
12 Honor, we have a number of stipulated exhibits for admission.
13 I can read those into the record?

14 THE COURT: Go ahead.

15 MR. CONLEY: Defendant's Exhibit numbers 128, 163,
16 164, 165, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440,
17 441, 442, 899, 900, 901, 903, 805 and 897.

18 THE COURT: Received.

19 (Defendant's Exhibits 128, 163, 164, 165, 431, 432,
20 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 899, 900,
21 901, 903, 805 and 897. received in evidence)

22 DIRECT EXAMINATION

23 BY MR. CONLEY:

24 Q. Good morning, Mr. Imburgia.

25 You prepared a set of slides to assist us with your

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1 testimony today?

2 A. Yes.

3 Q. If we can have DTX 10, please.

4 Are these those slides?

5 A. Yes.

6 Q. Could you please introduce yourself to the jury?

7 A. Yes. My name is Basil Imburgia. I am a senior managing
8 director at the firm of FTI Consulting. FTI Consulting has
9 about 7,000 consultants, and it's a global consulting firm and
10 the North American leader of the forensic and lead services
11 segment. I'm a certified public accountant, certified fraud
12 examiner, and certified in financial forensics. And I have
13 over 30 years of accounting and consulting experience.

14 I was formerly a partner at PriceWaterhouseCoopers and
15 KPMG, two of the four big accounting firms. And I've been with
16 FTI for the past 20 years or so. And I'm a member of the
17 American Institute of Certified Public Accountants, the New
18 York State Society of Certified Public Accountants. And I'm
19 currently on the Merger and Acquisition Disputes Task Force of
20 the AICPA. And in 2000 and 2001, the chairman of the New York
21 State Society of CPAs Litigation Services Committee.

22 Q. Can you please tell the jury a little bit about your
23 experience as it relates to cases like this?

24 A. Yes. I started my career doing a lot of financial
25 statement audits and worked with a lot of apparel, retail,

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1 textile-type companies.

2 For two years I worked on the Allied Federated
3 Bankruptcy. Many of those retail stores were acquired,
4 ultimately by Macy's, a long time ago. There were a lot more
5 retail stores, like A&S and Johnny Wanamaker's and Stern's, and
6 a lot of those locations got acquired by Macy's. So I worked
7 in the retail area for two years on that restructuring and
8 bankruptcy.

9 The items in green on the chart are where I've done
10 different types of profit calculations or damage calculations
11 in litigation or arbitration. And the ones that are in yellow
12 that just popped up are audit clients I had, like Tommy
13 Hilfiger, Murjani, Jordache, and Escada. I had to audit the
14 books and records of those companies.

15 Q. If we can pull up DTX 897, please.

16 Mr. Imburgia, do you recognize DTS 897?

17 A. Yes. That's my c.v.

18 Q. Is it accurate?

19 A. Yes.

20 Q. Could you tell the jury what you were asked to do in this
21 case?

22 A. Yes. I was asked to -- anytime you're doing some kind of
23 damage analysis, you have to assume liability. So I assumed
24 that the accused products are infringing on the mark and those
25 kinds of things. You have to make an assumption. I have to

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1 assume harm because that's the reason why I would go in and do
2 a damage calculation.

3 So I was asked to do a profits calculation on the
4 sales of accused products, and I was also asked to analyze
5 royalties as an alternative and review the report presented by
6 adidas' expert, Mr. Plumpe.

7 Q. If we can go back to slide four.

8 Could you provide a high-level summary of your opinion
9 as it relates to your profits analysis?

10 A. Yes. My summary opinion is the profits from the sales of
11 accused products are \$1,751,705, and those are profits for the
12 period 2015 through 2022 on approximately \$15.6 million of
13 accused product sales.

14 Q. Let's discuss how you arrived at that conclusion.

15 Could you please explain how you began your analysis?

16 A. Yes. So when you're doing a profits calculation, first
17 thing you need to do is identify sales. So the sales for the
18 accused products from 2015 through 2022, identify the company
19 did an analysis looking at probably 128 SKUs, stock keeping
20 units that are accused in the case. They do a drill down and
21 look at their information, their books and records, and they
22 identify those sales.

23 The second thing that has to happen is you have to
24 look at cost of goods sold. Thom Browne in the U.S. actually
25 buys product that are manufactured for them. So there is an

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1 invoice price reflecting the purchases of those products,
2 that's the cost of goods sold, that gets deducted as an
3 expense. Then there is certain costs that vary with sales, so
4 as sales increase, those costs increase. Those have to be
5 identified and deducted. And then you look at what we have
6 down here as needed controllable costs. These are costs below
7 the variable cost line, and you have to go through and identify
8 which of those costs are needed to produce and sell accused
9 products.

10 So I went through analyzed those costs. I analyzed
11 what costs should be included in the controllable costs and
12 which costs should be excluded, and then deducted the ones that
13 should be included because they were needed to produce and sell
14 the accused products.

15 Q. So how did you arrive at your total profits numbers?

16 A. So the profit number that you see here for the '15 through
17 '22 period of 1.7 million approximately, what I did is I added
18 up the cost of sales, I added up the variable expenses, and I
19 added up the controllable expenses that were needed. And those
20 became the expenses I deducted from sales to get to profits.

21 Q. All right. Let's start with sales.

22 How did you identify sales of accused products from
23 2015 to 2022?

24 A. So the company, the Thom Browne entity, their CFO and head
25 of business intelligence did an analysis based on the SKUs that

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1 were alleged or the accused SKUs, and they did a drill-down
2 analysis. So they identified sales from 2015 through 2022 by
3 different channel.

4 So you'll see this chart breaks the channels up:
5 Wholesale, retail and e-commerce. So wholesale is if Thom
6 Browne in the U.S. is selling to Nordstrom's products. That's
7 the wholesale sales. The retail sales are the sales made by
8 the Thom Browne retail stores in the U.S. And then e-commerce
9 is our sales that are made through web kind of orders.

10 Q. Is that summary of sales reflected in DTX 899?

11 A. Yes, it is.

12 Q. Let's move to cost of goods sold.

13 How did you arrive at the total cost of goods sold or
14 COGS?

15 A. So the cost of goods sold is the invoice price charged from
16 the manufacturer to the Thom Browne U.S. entity. So I was able
17 to, from the Thom Browne U.S. financial statements, I was able
18 to pick up what the cost of goods sold was. Mr. Plumpe deducts
19 cost of goods sold; I deduct cost of goods sold, so we agree on
20 that deduction.

21 Mr. Plumpe stops at gross profit. I needed to go
22 further than that, and so I analyzed those other expenses that
23 I discussed. My cost of goods sold figure was a deduction of
24 about 55 percent of sales; Mr. Plumpe's was 57. So my number
25 was less of a deduction, so it was more conservative.

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1 And then one thing that was important, this last
2 bullet point is I needed to understand the mix of sales for the
3 accused products versus the overall U.S. entity, and my next
4 chart does that.

5 Q. If we can go to the next slide, please.

6 Tell us about the chart we see here.

7 A. Yes. What I wanted to be able to do is look at the overall
8 sales of U.S. products from '15 through 2021 and there is
9 approximately -- this is Thom Browne in the U.S. -- there is
10 approximately \$119 million of total product sales. And since
11 the profit-and-loss statements I had were for the total U.S.
12 company, I wanted to make sure that the sales mix of the sales
13 channels for the accused products were similar.

14 And what I found is that approximately 50 percent of
15 the accused products went through the wholesale channel, 25
16 percent roughly the retail channel, and 25 or so percent the
17 e-commerce channel.

18 The reason is because when I'm looking at total
19 expenses for the business, I need to make sure that if I'm
20 looking at a total expense, that it would be similar as an
21 expense for the accused products. And the mix tells me that I
22 can use the overall financial statements as a good proxy for
23 calculating expenditures.

24 Q. How did you go about determining Thom Browne's gross
25 profits on sales of the accused products?

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1 A. So the first thing you typically look for is, does Thom
2 Browne have any product line P&Ls where they are actually
3 calculating by product profit and loss, and they didn't have
4 those statements historically prepared or available.

5 So what I needed to do is obtain an understanding of
6 the historical financials. And what I found is that from 2015
7 through 2018, the gross profit percentages were inconsistent.
8 They ranged from 22 to 66 percent. There was some grouping
9 issues that management talked about where things were
10 inconsistently grouped in the early periods.

11 So what I ended up looking at was 2019 through 2021,
12 and I saw that the cost of goods sold and the gross profits
13 were historically consistent in those years. And those were
14 also for 2020 and 2021. Those were years that this entity was
15 audited by Deloitte & Touche. After an acquisition in 2018,
16 there was an SAP system put in place for 2020 and 2021, where
17 the groupings were similar, that management felt that these
18 financials were the best and most accurate from a
19 consistency/reliability standpoint. And as I said, audited by
20 one of the big four accounting firms.

21 So we decided, based on our discussions with
22 management, that 2020 and 2021 were the income statements for
23 Thom Browne that we should utilize to calculate profits.

24 Q. And what did you do next in your profits analysis?

25 A. So we went to the Thom Browne, Inc. -- that's the U.S.

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1 entity -- and we saw that the Thom Browne, Inc., financial
2 statements for '19, '20 and '21 were losing money from an
3 operating standpoint. The reason for that is many of the
4 marketing functions, the public relations, the communication
5 functions since Thom Browne started in the U.S., a lot of those
6 departments service not only the U.S. entity with customer
7 communications and marketing and things like that, they service
8 the globe.

9 So when you take those expenditures and deduct those
10 from the U.S. gross profit, it creates a negative number. So
11 because of that and our obtaining an understanding from
12 management that the U.S. entity and those kinds of marketing
13 expenditures and things like that service the global business,
14 and many of the global expenditures actually service the global
15 business plus the U.S. business, we looked at controllable
16 expenses on a total global company basis and then allocated
17 that back to the specific accused products.

18 Q. Tell us a little bit more about how you went about
19 deducting costs.

20 A. So these are the categories of expenses that I previously
21 discussed. Cost of goods sold, that the invoice price that the
22 U.S. pays for the products they are selling. So I was able to
23 source that from a Thom Browne U.S. profit-and-loss statement.
24 The variable expenses, these are the expenses that move with
25 sales up or down that vary. As you sell more, you're going to

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1 incur more expenses. Those available expenses I was able to
2 source from the Thom Browne U.S. profit-and-loss statement as
3 well.

4 The controllable expenses, those are the ones I used
5 the global profit-and-loss statement because of the fact that
6 the Thom Browne U.S. financial statement actually showed a
7 loss. So this was a more conservative way to look at the
8 controllable expenses.

9 And then things like fixed rent, variable rents and
10 occupancy costs, I was able to use the Thom Browne U.S. to
11 identify those categories of expenses.

12 Q. All right. Let's start with cost of goods sold.

13 What did you ultimately conclude there?

14 A. My conclusion after looking at the profit-and-loss
15 percentages from Thom Browne U.S. financial statements are that
16 the cost of goods sold in '20 and 2021 were pretty similar.
17 They were about 55 percent or so. So that became an amount
18 that we deducted for cost of goods sold.

19 Q. Are these percentages reflected in DTX 901?

20 A. Yes.

21 Q. Now, could you please explain to the jury the variable
22 expenses that you considered?

23 A. So there are a number of variable expenses identified on
24 Thom Browne's financial statement, Thom Browne U.S.'s financial
25 statements. There is employee commissions, so those are the

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1 commissions that are paid to the retail store employees.

2 So if you go to a retail store, especially a high-end
3 retail store, you're going to get assistance from the store
4 clerks. And many times you go to the register, they'll tell
5 you who helped you kind of thing. Well, those individuals that
6 are helping you buy products at the retail stores are getting a
7 commission, roughly a five percent commission. So those
8 employee commissions are a variable expense or a sales increase
9 at the retail locations. Those commissions will increase as
10 well.

11 Concession fees are fees paid to Farfetch. Farfetch
12 is an online system where you can buy Thom Browne products.
13 They also manage the Thom Browne website and those orders, so
14 they charge a commission of about 30 percent for sales through
15 their, in essence, e-commerce channel. So that's a variable
16 expense because as you sell more product, you're going to pay
17 more of a commission.

18 Credit card fees are exactly that. Those are fees for
19 credit cards that are used at the retail location, used for
20 e-commerce purchases, so those will vary with sales as well.

21 Factoring charges are if Thom Browne has some
22 wholesale clients that they sell the receivables because they
23 want cash collections quicker, or some of the retail sales they
24 go out and get what we call credit enhancement insurance. So
25 they actually pay an insurance company to ensure collection of

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1 receivables, and those are volume-driven as well based on the
2 sales volume, that insurance.

3 And then other variable expenses is very small kind of
4 catchall for other variable expenses. I think there is a few
5 thousand dollars in that expenditure category that were
6 deducted as variable costs as well.

7 Q. Are these expenses reflected in DTX 435 through 438?

8 A. Yes.

9 Q. What did you ultimately conclude with respect to variable
10 expenses?

11 A. So the variable expenses for '20 and '21 were approximately
12 10 percent or so, and those variable expenses were deducted
13 from the sales of accused products as well.

14 Q. Shifting gears to controllable expenses, could you please
15 explain the controllable expenses that you considered?

16 A. So when looking at these controllable expenses, we wanted
17 to identify expenses that had a connection to production or
18 sale. The expenses that we identified were selling expenses,
19 sample and design, advertising and marketing, compensation and
20 benefits for related selling sampling, design advertising, and
21 marketing departments, fixed costs at retail locations,
22 variable rents at retail locations, and then other occupancy
23 costs at retail locations, and then travel and entertainment
24 relating to different kinds of sales-type events.

25 Q. Let's start with selling costs.

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1 Could you tell us a little bit about those?

2 A. So selling costs have categories of freight. So handling
3 freight, so to get products to retail locations, to wholesale
4 locations, and things like that, there is going to be freight,
5 duty and handling, and packaging and processing and things like
6 that. So those selling costs relate to getting products to
7 market and selling, so those were included.

8 And then brand-building exercises, like modeling
9 agencies, photo shoots were also included because those kinds
10 of things, like modeling agencies and photo shoots, are going
11 to be -- they are going to have a connection to selling product
12 as well and building the brand.

13 And then clothing displays and storage at the retail
14 locations, those are going to be related to selling as well.

15 Q. Did you exclude any selling expenses?

16 A. Yes. I spent probably in total about five hours with
17 management discussing different general ledger. Those are the
18 books and records where they record these expenses, different
19 types of expenses by line item. And a number of the expenses
20 when we discussed them with management don't relate to the
21 accused products. Many of them, like things like garment bags
22 and mending expenses or alterations, really relate to suits and
23 things like that, not to the accused products. And some of the
24 selling expenses specifically relate to, like, Japan and Italy.
25 So those were, as we discussed them with management, were

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1 excluded as well.

2 Q. Tell us a little bit about sample and design costs.

3 A. So sample and design costs are exactly what you would
4 think. They are, you know, mostly the materials used when you
5 have a prototype product and you design those prototype
6 products. There is people putting them together so they can go
7 out to the market and show the buyers the different types of
8 products so they can see them before the buyers are making
9 orders for them, as well as they are making those samples so
10 internally they can be reviewed and decisions can be made about
11 selling products relating to sample and design costs. So, in
12 essence, these are exactly what you would think. They are the
13 samples and designs and the costs relating to those.

14 Q. Did you exclude any selling expenses?

15 A. Yes. Again, through our discussions and interviews with
16 management, there were certain types of prototype expenses,
17 like accessories and knit cut and sew, and special projects
18 that when we interviewed management, they didn't relate to the
19 accused products. So those categories of expenses were not
20 deducted.

21 Q. Tell us about advertising and marketing costs.

22 A. So advertising and marketing, it has general marketing,
23 public relations, fashion shows, the Met Gala, Red Carpet
24 events, digital marketing, social media influencers, look books
25 went to the sales catalogs where all these products that are

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1 displayed in books, and things like that.

2 So what this all is, is this the cost to get your
3 product and your brand known. When we look at all of those
4 things, these events, they are building the Thom Browne brand.
5 And the whole purpose of advertising marketing spend is, as
6 you're building the brand for all your products, you are doing
7 it so you're influencing customers to go out and buy the
8 products. Whether they are wholesale customers like
9 Nordstrom's and the buyers there being influenced to buy
10 products or the retail consumer going out and buying products,
11 it's all building the brand image and the brand name.

12 So because advertising and marketing has, you know, a
13 direct link to product sales, those costs were included as
14 being needed for production and sale of products.

15 Q. Tell us about compensation and benefits, another category
16 in controllable costs.

17 A. Yes. So there are two categories. There is compensation
18 and benefits, and the company had breakdowns of compensation
19 and benefits by department. So the way I'm typically doing
20 this is, I'm looking for departments that deal with production
21 or sale. So customer communications, design departments,
22 logistics, marketing, retail, people at the retail store, the
23 merchandising, the people that are kind of handling inventory
24 management, taking orders, things like that. Logistics that
25 deals with shipping products.

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1 Client value management is one where they actually
2 have the customer contact database and they keep a history of
3 customer purchases. So when they analyze historical sales of
4 products and things like that, they can present that to the
5 buyers in an effort to convince them to buy certain products
6 that are selling really well, things like that. So all of
7 these things are related to the production and sale, so those
8 compensation and benefits we include as a deductible expense.

9 I excluded what I'll call more of the general
10 administrative functions, like, finance, general, HR, the
11 intercompany, the IT, the officer salaries. Because I look at
12 the expenditures and say, you know, the people that are working
13 on merchandising and selling products, those should be
14 deducted.

15 I always use the scenario, if the CFO took off a
16 month, I don't think that is going to affect product sales or
17 production, right. So the administrative functions, even
18 though they are recording sales, and accounting inventory
19 management and things like that, they are further away from
20 being a connection to sales and production, so we excluded
21 those costs as a deduction.

22 Q. Just for the record, when you referred to client value
23 management, was that the reference to CVM?

24 A. Yes. So ultimately compensation that we deducted was
25 58 percent; compensation we excluded was about 42 percent.

NlBsADI1

Imburgia - Direct

1 Q. All right. Let's move on to other variable rent costs.

2 A. So when it comes to rent, since you need the retail stores
3 and you need that rent to sell products through the retail
4 channel, that becomes a cost that is associated with selling
5 product.

6 So I included the fixed retail store rent for the U.S.
7 There is two stores, one in Miami and one in California, that
8 have certain targets that the fixed rents will be higher, and
9 if you make a certain amount of sales, there will be some
10 variable rent.

11 So I included those variable rent expenses as a
12 deduction, as a cost to deduct. And then things like the
13 corporate offices' rent, since those are more general functions
14 and they are less connected to selling and producing product,
15 I excluded those.

16 Q. Tell us about other occupancy costs, please.

17 A. So other occupancy costs are going to be primarily things
18 like taxes on the locations, water, electricity, heating,
19 cleaning costs, security, some postage, stationery, some
20 equipment rentals.

21 Since the entity actually had breakdowns of all of
22 these costs by the different functions, what I did is I only
23 included the other occupancy costs for the retail stores,
24 right. You need the retail stores to sell retail products, so
25 the water and electricity, heating, real estate taxes, I

N1BsADI1

Imburgia - Direct

1 included those for the retail stores and excluded the other
2 occupancy costs relating to corporate offices and things like
3 that.

4 Q. Next, could you tell us about the travel and entertainment
5 category?

6 A. So the travel and entertainment category really is -- it
7 consists of sales kinds of activities, right. The biannual
8 selling campaigns for fall and winter. There is a lot of
9 travel of the sales and marketing folks from the company in the
10 U.S. to locations for things like the international fashion
11 week, which happens four times a year in London, New York,
12 Milan, and Paris. They are getting together before and after
13 those events to finalize products. After the events they
14 actually have events where they are selling products to buyers
15 and things like that.

16 So what I did is, because I had breakdowns of the
17 expenditures -- and this is only for the U.S. -- I looked at
18 the total U.S. travel and entertainment spending, and then I
19 removed the executive and officer travel relating to that and
20 kept in those sales and marketing functional travel, because
21 they are going to be more related to sales and production of
22 product.

23 Q. Finally, what about nonoperating expenses?

24 A. So things like depreciation, even if they are depreciation
25 of high-end furniture in the retail stores, I excluded all

NlBsADI1

Imburgia - Direct

1 depreciation and amortization. Here is a listing of the
2 different types of depreciation and amortization, you know,
3 software licenses and things like that, excluded these as
4 deductions.

5 Q. Can you provide us with a summary of your excluded costs?

6 A. Yes. So things like professional fees, depreciation,
7 amortization, interest, license fees, permits, IT maintenance,
8 permit and consultants, which are a lot of the departmental
9 leads. Things like garment bags, mending expenses and
10 alterations that don't relate to the accused products, they
11 relate more to suits and things like that. And then, as I
12 said, certainly administrative compensation, like the
13 financial, HR, IT departments, officers, those were excluded.

14 Q. What did you ultimately conclude with respect to
15 controllable costs?

16 A. That approximately 24 percent roughly of excludable costs,
17 controllable costs, should be deducted.

18 Q. What are the total profits after deducting costs of goods
19 sold, variable costs, and other costs related to production
20 sales?

21 A. They were approximately 11 percent or so. So I used 2020,
22 actual financial statements to develop the 10.5 percent profit
23 for 2020. I applied the 11.4 percent for 2021 to the 2021
24 sales. For 2022, I used the combined financials for 2020 and
25 2021, so I used the 11.3 and calculated the profits for 2022.

N1BsADI1

Imburgia - Direct

1 And because, as I said, the years prior had a number of issues
2 relating to them, I used the 11.3, the combined profit figure,
3 for 19 and prior in my calculations.

4 Q. Is that summary reflected in DTX 901?

5 A. Yes.

6 Q. What is your summary amount to in terms of dollars?

7 A. So, as I said, for the period 2015 through 2022, we had
8 about \$15.6 million of accused products. Applying the
9 different profit percentages that I just was discussing, I get
10 the \$1,751,705 in profits on those accused products.

11 Q. Just for good measure, could you provide us with a summary
12 now of your profits analysis?

13 A. Profits, as I said, is approximately 15.6 million in sales
14 and 1.7 million in profits.

15 Q. Do you have any other opinions in this matter?

16 A. I also did a royalty calculation for the same period.

17 So a reasonable royalty is an alternative opinion in
18 this matter. So if profits aren't the designated loss damage
19 calculation, as an alternative, you can use a royalty
20 calculation. Normally I'm doing those kinds of calculations as
21 an alternative.

22 So for the period of 2015 through 2022, applying a
23 reasonable royalty rate to the 15.6 million, I get \$867,225 in
24 a royalty payment.

25 Q. Is that summary reflected in DTX 903?

N1BsADI1

Imburgia - Direct

1 A. Yes.

2 Q. And for both your profits analysis and your royalty
3 analysis, you assumed liability?

4 A. I assume liability and harm, and then went to do my
5 calculations.

6 MR. CONLEY: No further questions.

7 THE COURT: Cross-examination. Oh, before we hear
8 questions from counsel.

9 You were determining damages on the assumption that
10 the plaintiff had proven trademark infringement, right?

11 THE WITNESS: Correct.

12 THE COURT: You didn't do any analysis as to what
13 damages, if any, were available if the plaintiff proved
14 trademark dilution, did you?

15 THE WITNESS: I don't believe I made any separations,
16 no.

17 THE COURT: They wouldn't necessarily be the same,
18 would they?

19 THE WITNESS: Possibly not. I did a kind of
20 discouragement calculation assuming liability. I don't think I
21 went through and did a separate -- I didn't do any separate
22 analysis.

23 THE COURT: You just assumed infringement?

24 THE WITNESS: I assumed infringement, that's correct.

25 THE COURT: Very good.

N1BsADI1

Imburgia - Cross

1 CROSS-EXAMINATION

2 BY MR. FLEMMING:

3 Q. Hello, Mr. Imburgia.

4 A. Hello.

5 Q. In your testimony you talked about expenses -- and I wrote
6 these down -- related to, connected to, or with a nexus to the
7 accused products?

8 A. Yes.

9 Q. So would you please tell us the exact standard that you
10 actually used to decide which expenses should be deducted from
11 net sales to reach profits?

12 A. Yes. So when you're looking at sales and calculating the
13 expenditures to deduct, there has to be a nexus or connection.
14 So as an accountant, the ones that are very easy are things
15 like cost of goods sold. Cost of goods sold are the purchase
16 of the products you're selling, so you need those costs to sell
17 the product. So costs of goods sold has a connection because
18 the purchase of the products, and we're selling those products.
19 And as I sell more products, I need to buy more products.

20 So cost of goods sold, in my view, always has a
21 connection because it's a variable-type expenditure that's
22 required to sell products, so cost of goods sold is one
23 category. That's pretty simple.

24 Q. So you mentioned that if there is a connection.

25 Is it a direct connection, is it a close connection,

NlBsADI1

Imburgia - Cross

1 like what language were you thinking of what you were writing
2 your report?

3 A. What I typically do in my mind -- because it is variable
4 costs are an accounting concept, right. So it's easy for an
5 accountant to come up and say cost of goods sold is variable.
6 Commissions, concession fees, those kinds of costs vary as I
7 sell more. So those things, from an accounting standpoint, you
8 always deduct those in a profits calculation because they vary,
9 so those are easy.

10 Then you get to controllable costs, which some may be
11 variable, some may be fixed. And then I have to make an
12 assessment, after interviewing management, looking at the books
13 and records, which are the costs that need to be included
14 because they have a connection or a nexus.

15 So when I do that assessment, what I do is I look at
16 the different categories, I understand the costs, and I have to
17 make a determination. Are these costs -- and the way I think
18 about it is, if I eliminate this cost, is it going to have an
19 effect on production and sale, and that is how I think about
20 the process.

21 So I use my example, if the CFO took a two-month
22 vacation, probably wouldn't affect my production and sale. So
23 I look at that and say that's not really connected. That's not
24 really a cost that I need to produce and sell product. But
25 when it comes to things like the design function, you know,

NlBsADI1

Imburgia - Cross

1 that would be a cost that I need. I need to design products to
2 show the buyers so they can buy products.

3 So that is the way I do it. I look at those
4 categories of expenses and say which ones do I need to produce
5 and sell products.

6 Q. So you agree with me that the jury ultimately will make the
7 decision on what expenses should be deducted, correct?

8 A. I agree with that, yes.

9 Q. And so you're saying that the jury should just consider
10 costs that are either related to or connected to in some way or
11 with a nexus to or -- yeah, I think you also may have had some
12 other language in there.

13 You can't give a specific language that the jury
14 should consider in deducting expenses, they just need to
15 consider that full two-minute explanation you just gave?

16 MR. CONLEY: Objection, compound.

17 THE COURT: Sustained.

18 Q. Mr. Imburgia, your presentation earlier states that Thom
19 Browne, Inc., lost money from 2019 through 2021, is that
20 correct?

21 A. Thom Browne, Inc., selling general administrative expenses,
22 were greater than the gross profit. It created an operating
23 loss. Then there's, like, a transfer pricing profit share
24 adjustment that takes profits from other Thom Browne global
25 entities and moves it in, really, like a tax adjustment, and

NlBsADI1

Imburgia - Cross

1 moves it in and makes it profitable.

2 But the selling, general administrative expenses in
3 the general ledger are greater than the gross profits, so it
4 creates a loss.

5 Q. Am I correct that your presentation stated that Thom
6 Browne, Inc., lost money from 2019 through 2021?

7 A. On an operating basis, yes.

8 Q. And in forming your opinions in this case, you relied on
9 the fact that Thom Browne, Inc., is majority owned by a company
10 called Ermenegildo Zegna, correct?

11 A. Yes.

12 Q. And Zegna -- can we call it Zegna for short?

13 A. That's fine.

14 Q. Zegna is a Dutch limited liability company, is that
15 correct?

16 MR. CONLEY: Objection, relevance.

17 THE COURT: Overruled.

18 A. Yes.

19 Q. And Zegna owned a 90 percent share in Thom Browne, Inc.,
20 correct?

21 A. Correct.

22 Q. And Mr. Browne owns just a 10 percent share in his company?

23 A. I believe so.

24 Q. And Zegna bought a majority share of Thom Browne, Inc., in
25 2018, is that right?

NlBsADI1

Imburgia - Cross

1 A. Yes.

2 Q. So Thom Browne, Inc., still lost money in those three years
3 following its acquisition by Zegna, correct?

4 A. Again, on an operating basis, that's correct.

5 Q. Let's bring up your presentation and go to slide six.

6 So it's your professional opinion that since 2015,
7 Thom Browne has never made more than 11.4 percent in profits
8 from sales of the accused products?

9 A. My opinion is this is the profits calculation that I
10 determined based on my review of the expenses to include and
11 what expenses to exclude.

12 Q. So is it your professional opinion that Thom Browne, Inc.,
13 never made more than 11.4 percent in profits from sales of the
14 accused products?

15 A. From sales of the accused product, that's correct.

16 MR. FLEMMING: May I approach the witness, your Honor?

17 THE COURT: Yes.

18 Q. I'm going to hand you what's been marked as Plaintiff's
19 Exhibit 705, which is already in evidence.

20 You're holding a Thom Browne jacket, correct?

21 MR. CONLEY: I'm going to object, your Honor. It's
22 outside the scope of his report, his opinions.

23 THE COURT: Well, I don't know yet. All he's been
24 asked is to look at it.

25 Do you want a sidebar, though?

N1BsADI1

Imburgia - Cross

1 MR. CONLEY: Please.

2 (Continued on next page)

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N1BsADI1

Imburgia - Cross

1 (At the sidebar)

2 THE COURT: So what are you proposing to ask him about
3 this?

4 MR. FLEMMING: The price, which is \$1,500, and
5 perspective what only 11 percent in profits would look like for
6 \$1,500 jacket.

7 MR. CONLEY: It's not what he offered opinions on.

8 THE COURT: Pardon?

9 MR. CONLEY: It's not what he offered opinions on.
10 He never inspected a physical product and looked at
11 the books and records of the company and did his analysis.

12 THE COURT: Well, but he could ask him what the
13 calculation would be on any given item because it to his
14 opinion what the calculation is for all the items.

15 I'll allow it.

16 (Continued on next page)

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N1BsADI1

Imburgia - Cross

1 (In open court)

2 BY MR. FLEMMING:

3 Q. Mr. Imburgia, that's a Thom Browne jacket, correct?

4 A. Yes, that's what the tags say.

5 Q. And it has a price tag on it.

6 Can you find that, please, and let me know when you've
7 found it?

8 A. I found it.

9 Q. And the price is \$1,450, correct?

10 A. That's correct.

11 Q. So is it your professional opinion that if Thom Browne sold
12 that jacket for \$1,200, Thom Browne actually would have lost
13 money on that product?

14 A. Yeah. That's a difficult question to answer because when
15 they are provided from Thom Browne trading a product, they mark
16 them up in a similar way. So if you're changing the price of
17 the product and saying it's a lower price, probably they are
18 going to be paying a lower price from Thom Browne trading, the
19 Swiss company. So I don't think it would change the
20 profitability at all. It probably -- they would just have cost
21 of goods sold that was less because the markup -- the markup on
22 these products are the same.

23 If you want me to just assume the company is just
24 going to charge higher and then markup is not going to be
25 consistent with what they normally do, then there would be --

NlBsADI1

Imburgia - Cross

1 there would be another 20-something percent of cost in there
2 under that assumption.

3 Q. Assuming that the costs stay the same, but assuming that
4 the only change is that Thom Browne sells that jacket to
5 consumers at a price of \$1,200. Under your calculations, Thom
6 Browne, Inc., would actually lose money on that sale?

7 A. Well, if you're talking about my calculations, you have to
8 follow what the company does and how they mark up consistently.

9 What you're doing is just putting a hypothetical in
10 place and saying the company doesn't mark it up the way they
11 do. Just assume that, so if I'm going to assume that there is
12 not as much markup, right, when you think about the fact that
13 there's 45 percent gross profit, 55 percent cost of sales, that
14 would change in my model based on what the company does.

15 If you're just saying that assume that it's not a
16 45 percent profit, it's 25 percent profit, in gross profit they
17 would lose money then, if the price is the same.

18 Q. So you can't answer the hypothetical, if Thom Browne
19 decides to sell that product for \$200 less, you have to add a
20 bunch of assumptions on top of that to not answer the
21 hypothetical?

22 MR. CONLEY: Objection, argumentative and asked and
23 answered.

24 THE COURT: Sustained.

25 Q. Mr. Imburgia, you were retained in this case to offer

NlBsADI1

Imburgia - Cross

1 opinions on monetary remedies, correct?

2 A. Yes.

3 Q. And you were also retained to criticize certain aspects of
4 Mr. Plumpe's expert report?

5 A. Correct.

6 Q. And one of your criticisms is that Mr. Plumpe should have
7 deducted more than just cost of goods sold in calculating
8 profits, right?

9 A. I believe there are other expenditures that I'm deducting
10 that are required to be deducted. I don't think Mr. Plumpe
11 analyzed those because he didn't have access to management, so
12 I think he just stopped at gross profit.

13 Q. So you decided what those extra expenditures were based on
14 private conversations with Thom Browne's management?

15 MR. CONLEY: Objection.

16 THE COURT: Ground?

17 MR. CONLEY: Mischaracterization.

18 THE COURT: Pardon?

19 MR. CONLEY: Mischaracterization.

20 THE COURT: Well, if it's a mischaracterization, the
21 witness will correct it.

22 Overruled. You may answer.

23 A. I think it's a combination of my five hours of interviews
24 with management team. But I did read depositions of the same
25 management team, so it's a combination of both of that.

NlBsADI1

Imburgia - Cross

1 Q. So those five hours of conversations, those were private
2 conversations that were not recorded?

3 A. They weren't recorded, but we documented the discussions in
4 our 127-page report that describes all of the general ledger
5 expense categories, what they relate to, whether it should be
6 included or excluded, and why.

7 Q. And no one was under oath in those five hours of
8 conversations, is that right?

9 A. Nobody was under oath.

10 Q. You spoke with Luigi Gajo, correct?

11 A. Correct.

12 Q. And he sat for a deposition, correct?

13 A. Correct.

14 Q. And you spoke with Andy Ng?

15 A. Correct.

16 Q. And Andy Ng did not sit for a deposition?

17 A. I don't believe so.

18 Q. And other than Mr. Gajo and Mr. Ng, you didn't speak with
19 anyone else at Thom Browne in forming your expert opinions?

20 A. No. That was the management team, the CFO and the head of
21 business intelligence, that we interviewed.

22 Q. Mr. Gajo didn't testify at trial, did he?

23 A. I wasn't here, so I don't know.

24 THE COURT: I need to interrupt at this point to
25 inform the ladies and gentlemen of the jury that either side

NlBsADI1

Imburgia - Cross

1 has a right to take the deposition of anyone and either side
2 has the right to call any witness they think is relevant.

3 So bear that in mind in assessing the last few
4 questions and answers. There is nothing in the law that
5 prevents an expert from having conversations with people, as
6 long as when he's here, he is prepared to reveal the substance
7 of those conversations, and also he references in his report
8 the fact that he had those conversations.

9 Go ahead, counsel.

10 BY MR. FLEMMING:

11 Q. Mr. Imburgia, as we talked earlier, in calculating profits,
12 you deducted additional expenditures other than costs of goods
13 sold, correct?

14 A. Correct.

15 Q. And you deducted storage space costs, is that right?

16 A. Yes.

17 Q. But Thom Browne didn't rent any new storage space
18 specifically for the accused products, right?

19 A. I think this is just storage space, really, at the retail
20 locations where they are storing not only the accused products,
21 but all products.

22 Q. But Thom Browne didn't rent or purchase any new space
23 specifically for the accused products, correct?

24 MR. CONLEY: Objection, asked and answered.

25 A. I don't believe so.

N1BsADI1

Imburgia - Cross

1 THE COURT: Well, I'll allow it.

2 But when there is an objection, hang on.

3 THE WITNESS: I'm sorry.

4 THE COURT: Go ahead.

5 Q. You also deducted some employees salaries and benefits,
6 correct?

7 A. Correct.

8 Q. But Thom Browne didn't hire any new employees specifically
9 for the accused products?

10 A. I don't believe there were additional hires specifically
11 related to accused products.

12 Q. So even if the accused products did not exist, Thom Browne
13 would still be paying the same amount in employee salaries and
14 benefits, correct?

15 A. It's possible.

16 Q. You don't have any evidence otherwise?

17 A. As I said, when you get to the expenses, the controllable
18 costs expenses, I'm not doing a fixed and variable analysis,
19 I'm doing a connection and nexus analysis. So I'm looking at
20 the design department and saying, if I don't have that design
21 department, I'm not going to be designing these products so
22 it's going to affect sales. It's not a variable analysis. The
23 design department creates other products as well, but there is
24 a connection because if I'm not including those as --

25 MR. FLEMMING: Objection, narrative and nonresponsive.

N1BsADI1

Imburgia - Cross

1 THE COURT: No. You may finish your answer.

2 A. Just if I'm not including them, then I'm unfairly burdening
3 design department costs on the other products of the business
4 and not allocating them appropriately among the accused
5 products and the other products in the business. So you take
6 the design department, you divide it by total sales, and then
7 you get design department as a percent of sales, and then I'm
8 applying it to the accused product.

9 It's the design department. You need that department
10 to produce the accused products. If the accused products
11 weren't here, what you're saying is would the design department
12 costs be the same. Well, it's not a variable analysis. I
13 didn't do that analysis. What I'm doing is a connection and a
14 nexus analysis.

15 Q. So to confirm, you have no evidence that Thom Browne's
16 salary and benefits costs would change in any way if the
17 accused products did not exist?

18 A. That's correct. It's not a variable analysis. That's
19 right.

20 Q. Let's talk about some of the other expenditures that you
21 deducted.

22 And in the selling category, that includes provision
23 for bad debt reserve, correct?

24 A. Yes.

25 Q. And utilization of bad debt reserve?

N1BsADI1

Imburgia - Cross

1 A. Correct.

2 Q. And laundry services?

3 A. Yes.

4 Q. In the compensation and benefits category, you partially
5 deducted the following categories:

6 Vacation?

7 A. Yes. Salaries and benefits, that's correct.

8 Q. Ticket restaurant?

9 A. I would have to look.

10 Q. Travel allowance?

11 A. I believe so.

12 Q. Life insurance?

13 A. I believe so.

14 Q. And you talked about other occupancy during your testimony
15 earlier, right?

16 A. Correct.

17 Q. And you partially deducted these categories:

18 Gifts?

19 A. That's correct.

20 Q. Postage?

21 A. That's correct.

22 Q. Cleaning?

23 A. All as it relates to retail stores, but yes.

24 Q. Understood.

25 And water?

NlBsADI1

Imburgia - Cross

1 A. Yes.

2 Q. And in the travel and entertainment category, you deducted
3 all of the following:

4 Rental car?

5 A. Correct.

6 Q. Meals?

7 A. Yes.

8 Q. Entertainment expenses?

9 A. That's correct.

10 Q. Tolls?

11 A. Yes.

12 Q. Parking?

13 A. Yes.

14 Q. And laundry again?

15 A. That's correct.

16 Q. You said you agree with Mr. Plumpe that costs of goods sold
17 are deductible in calculating profits, correct?

18 A. Yes, that's correct.

19 Q. And you generally agree with Mr. Plumpe what types of
20 expenditures fall within cost of goods sold?

21 A. Correct.

22 Q. Your only difference in terms of costs of goods sold with
23 Mr. Plumpe is about two percent, right?

24 A. That's correct.

25 Q. And, in fact, Mr. Plumpe's cost of goods sold calculation

NlBsADI1

Imburgia - Cross

1 is more favorable to Thom Browne than yours?

2 A. That's correct.

3 Q. So, in other words, if the jury accepts Mr. Plumpe's cost
4 of goods sold calculation, that would actually be more
5 favorable to Thom Browne by about two percent?

6 A. That's correct.

7 Q. So if the jury agrees with Mr. Plumpe that only cost of
8 goods sold are deductible here, they don't need to go through
9 all these other categories of expenses that you talked about?

10 A. I don't believe that was Mr. Plumpe's opinion. I think he
11 stopped at gross profit and said he didn't have the ability to
12 analyze any other expenses. So I wouldn't say that's his
13 opinion on profits. That's his opinion on gross profits.

14 Q. Understood.

15 So if the jury believed that only cost of goods sold
16 were deductible and they used Mr. Plumpe's calculation, then
17 they wouldn't need to go through all the other categories of
18 expenditures that you have written about in your report?

19 A. That's correct.

20 Q. They would only need to look at your other expenditures if
21 they believed things like laundry and rental cars and meals are
22 attributable to the accused products?

23 A. As some of the categories, that's correct.

24 Q. Let's just talk about a few more of the categories and then
25 we'll move on.

N1BsADI1

Imburgia - Cross

1 In the advertising and marketing category, you
2 deducted all of Barcelona sales, is that right?

3 A. I think if you look, it actually was an income item. It
4 actually went the other way, so I actually included it because
5 it was -- it was brand-building. But I think it was a reversal
6 of a prior expense, so it actually was an income item.

7 Q. So Barcelona, you mean the partnership with the football
8 club, Barcelona?

9 A. Yes. And I think it was an income item, so we included it
10 in relation to brand building.

11 Q. OK. So with the clarity that it was an income item, is it
12 your professional opinion that Thom Browne's partnership with
13 FC Barcelona is directly related to sales of the accused
14 products?

15 A. I think we left it in because it was a profit figure and it
16 was more conservative, and that's the reason we included it.

17 Q. One more category.

18 You also deducted all expenses associated with Thom
19 Browne's fashion shows, correct?

20 A. That's correct.

21 Q. And you believe that all of those expenses were incurred in
22 connection with the sale or production of the accused products?

23 A. The fashion shows are a brand-building effort. And,
24 remember, I'm taking the fashion shows expense and dividing it
25 by the \$300 million of total company sales and getting a

NlBsADI1

Imburgia - Cross

1 percent. Then I'm applying that percent to the 15 million.

2 That's how I'm breaking it apart as to what applies to
3 the accused products and what applies to the other products.
4 But I did treat it as a brand-building effort that drives
5 sales.

6 Q. Let's bring up Plaintiff's Exhibit 1314, which is already
7 in evidence, and let's start at page 59.

8 Can you zoom in at the top there, please.

9 Mr. Imburgia, do you see that this is from the Thom
10 Browne website?

11 A. Yes.

12 Q. Do you see men's spring/summer 2015 runway there at the top
13 left?

14 A. Yes.

15 Q. And 2015 is where your profits calculation started,
16 correct?

17 A. Correct.

18 Q. And you reviewed images of the accused products in this
19 case in forming your opinions, is that right?

20 A. Yes. Because I had the plaintiff's identification as a
21 starting point and they had pictures of the accused products
22 and that's how the company went in and did the drill-down
23 analysis on the sales numbers, yes.

24 Q. And the drill-down spreadsheets that you reviewed also had
25 images of the accused products?

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Imburgia - Cross

1 A. Yes.

2 Q. All right. Let's zoom out so that we can see the whole
3 page.

4 Let's scroll through these fashion shows from 2015 to
5 2023, and you stop me when you see an accused product, please.

6 You can start.

7 (Pause)

8 A. That's pretty fast.

9 I see a couple.

10 Q. You saw a couple?

11 A. Yeah. I thought I saw some sweat socks --

12 Q. Oh.

13 A. -- with the stripe.

14 Q. Do you understand you have sweats?

15 A. Not this, but the jacket with the -- I thought I saw with
16 bars.

17 Q. OK. So you seen one or two products so far; yes?

18 A. Yes.

19 Q. All right. Let's keep going. We're almost near the end.

20 We can go a little slower now that we're closer to the
21 end.

22 (Pause)

23 You can take that down.

24 So in about 45 pages of Thom Browne's runway shows
25 from the last eight years, you saw a couple of accused

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Imburgia - Redirect

1 products?

2 A. Yes.

3 Q. And you deducted all expenses from the fashion shows in
4 your profits calculation as a percentage of net sales?

5 A. As a percentage of net sales, I took that whole category as
6 a brand-building category that is going to be related to
7 convincing customers to buy product.

8 Q. Thank you.

9 MR. FLEMMING: No further questions, your Honor.

10 THE COURT: Redirect?

11 MR. CONLEY: Very briefly.

12 REDIRECT EXAMINATION

13 BY MR. CONLEY:

14 Q. Mr. Imburgia, to your knowledge, does Mr. Plumpe dispute
15 any of the additional costs that you deduct in your analysis?

16 MR. FLEMMING: Objection, outside the scope.

17 THE COURT: Sustained.

18 MR. CONLEY: No further questions.

19 THE COURT: All right. Thank you very much. You may
20 step down.

21 (Witness excused)

22 THE WITNESS: Thank you, your Honor.

23 THE COURT: Does plaintiff rest?

24 MR. HENN: Plaintiffs already rested, your Honor.

25 THE COURT: Does defense rest?

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Imburgia - Redirect

1 MR. MALDONADO: Your Honor, we have one housekeeping
2 item.

3 THE COURT: Go ahead.

4 MR. MALDONADO: There are two designations that we
5 would like to move into evidence, deposition designations.

6 THE COURT: OK.

7 MR. MALDONADO: Defendant's Exhibit 923 and 924 from
8 yesterday.

9 MR. HENN: No objection.

10 THE COURT: Received.

11 (Defendant's Exhibits 923 and 924 in evidence)

12 MR. MALDONADO: Defendant rests your Honor.

13 THE COURT: Ladies and gentlemen, both sides have
14 rested, which means you get most of the day off.

15 Lucky you. But your work will really begin tomorrow.
16 Tomorrow starting at 9:30, you will hear first closing
17 arguments from counsel. Each side has up to an hour and a half
18 of closing arguments, so that will take us to essentially the
19 lunch break. Then you'll hear my instructions of law, which
20 will take about a half hour. So around, oh, 2:15, 2:30
21 tomorrow, the case will be yours to deliberate.

22 Now you can take as little or as long as you want for
23 deliberations. I've had juries return a verdict in five
24 minutes. I've had juries return a verdict in ten days. It's
25 totally in your control. However, if tomorrow you decide that

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Imburgia - Redirect

1 you want to deliberate beyond 4:30, which is totally up to you.
2 We can stop at 4:30 or come back on Friday. That's certainly
3 one possibility. But sometimes juries like, once they get into
4 it, like to deliberate longer. You have to let us know by four
5 o'clock so we can arrange, in worst-case, to have you
6 deliberate as long as seven o'clock tomorrow. But only if you
7 give us advanced notice.

8 OK. So until tomorrow, don't discuss the case with
9 anyone. This is a shame it's not a great day. I was going to
10 say you could go take a walk in Central Park, but it's probably
11 not the best day. Do whatever you like, and we'll see you
12 tomorrow at 9:30.

13 (Continued on next page)

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Imburgia - Redirect

1 (Jury not present)

2 MR. HENN: One piece of housekeeping on the record.

3 I understand that although Ms. Backman's deposition
4 excerpts were played in court, the reporter wasn't taking it
5 down. So we have marked that transcript as 1325, and for the
6 record to be complete, it should be included.

7 THE COURT: So that will be assuming both sides agree,
8 that could be sent to the jury if they ask for or they can ask
9 to see the videotape replayed. The only difference is anything
10 that is videotaped, if they ask for it and it's not in the
11 transcript, then we would have to bring them back here into the
12 court and play it, which is not a big deal. That's the
13 difference.

14 MR. HENN: I just wanted to make sure for the record
15 for the appeal.

16 THE COURT: Right. I assume defense counsel has no
17 problem with that transcript sent to the jury as part of the
18 exhibits?

19 MR. MALDONADO: That's correct, your Honor.

20 THE COURT: Very good.

21 (Plaintiff's Exhibit 1325 received in evidence)

22 Please be seated. So I assume at this point defense
23 counsel renews its motion for a directed verdict on all the
24 grounds that it previously indicated.

25 Was there any additional ground you wanted to add --

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Imburgia - Redirect

1 MR. MALDONADO: No, your Honor.

2 THE COURT: -- to the 47 you already had?

3 MR. MALDONADO: That's right, your Honor.

4 THE COURT: OK. So let's continue the discussion.

5 Some of this will also affect the charge, obviously. But I
6 still haven't heard, I don't believe, from plaintiff's counsel
7 a basis for not dismissing the punitive damages claim.

8 So the plaintiff's counsel says that when they did add
9 the four-stripe, the defendant didn't do any kind of search,
10 notwithstanding that the lawyers arguably suggested that they
11 do it. At least there was some indication to that effect. And
12 furthermore, that even after they were in 2018 told to stop,
13 they continued on.

14 All of that may go to question of bad faith, but I'm
15 not sure why it goes to punitive damages. Because punitive
16 damages don't just exist or don't exist at all for a dispute
17 between two parties that is personal just to those two parties
18 no matter how bad it is. It has to have a more raw, social
19 public factor involved.

20 I'm still at a loss to see any evidence of that in
21 this case.

22 MR. HENN: Well, your Honor, it's our position that
23 the same evidence that a jury could use to find willfulness
24 can also be weighed in a way that would justify punitive
25 damages. The reason there was a public interest in a trademark

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Imburgia - Redirect

1 case, unlike some other civil cases, is that as you're aware
2 there are really three parties in a trademark case: The
3 plaintiff, the defendant, and the public. And the whole
4 purpose of a Lanham Act is to protect the public from
5 confusion.

6 So in instances where a defendant takes actions --

7 THE COURT: So your claim is that in any case in which
8 there is willful infringement, then you're automatically
9 entitled to punitive damages because in some sense there's a
10 public interest in not being confused?

11 MR. HENN: I don't think I would agree with the way
12 you just phrased that --

13 THE COURT: I'm glad. That's good.

14 MR. HENN: -- as you cross-examined me there.

15 We're not saying every single case, you are entitled
16 to punitive damages. The issue here is whether the issue goes
17 to the jury and whether there is evidence in the record from
18 which a jury could conclude that what Thom Browne did either
19 with its failure to follow up with its counsel or otherwise
20 consider the likelihood of adding a fourth stripe would create
21 confusion, as well as the press of encouragement issues with
22 regard to the fourth stripe mark.

23 But separately, the Grosgrain products. Remember,
24 those are products where Mr. Browne testified, That is not my
25 mark. That was a design choice. I chose to do it that way. I

NlBsADI1

Imburgia - Redirect

1 chose to run it down right where adidas always does. And on
2 the shoes, significantly, I chose to take my design, first of
3 all which is white/blue/white/blue/red, and then conveniently
4 put it on a white shoe so you can't see any of the whites. And
5 not just do it in the skinny version of the ribbon, widen them
6 to the exact width essentially of an adidas stripe, angle it
7 exactly as an adidas stripe, and then call a shoe, you know,
8 that is not a running shoe, a running shoe, and put it out into
9 the public with images of people on tracks and running.

10 That's egregious behavior, your Honor, that should be
11 punished, and the jury has a right to make that determination.

12 THE COURT: So if we went down that road -- and I'm
13 glad you reminded me of that, because I was focusing more on
14 the four stripes, it would be limited then to those few -- the
15 punitive damages would be limited to those few products that
16 meet that kind of scenario you've just described.

17 MR. HENN: If you were to limit it in that way,
18 obviously we would be bound only to describe those particular
19 products in the context of punitive damages. My point was
20 simply that there is evidence as to several products from which
21 a jury could conclude that this behavior was sufficiently
22 egregious to require deterrence.

23 THE COURT: Let me hear from --

24 I'm sorry. Hold on a minute.

25 (Pause)

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Imburgia - Redirect

1 Yes. Just to let you know, there is a short matter
2 that I have to take at 11:15 because I thought we would be on a
3 break at that point. When we get to 11:15, we'll pause for a
4 few minutes.

5 Anyway, so what about the Grosgrain?

6 I keep calling it Grosgrain, but I take it it's
7 French?

8 MR. MALDONADO: It's Grosgrain. That's correct, your
9 Honor.

10 THE COURT: We don't pronounce the S because they
11 don't pronounce anything over there.

12 So go ahead. Anyway, what about that?

13 MR. MALDONADO: So there's no evidence to support what
14 Mr. Henn just told the court about the Grosgrain. The evidence
15 was that the defendant has used the Grosgrain on its clothing
16 from day one. They've used it not only as the tab, but also as
17 a decorative design element. And Mr. Childs testified about
18 that. They've always used it as a design element.

19 They've used -- you've seen manuals of the collections
20 through the years. It's been used all over the clothing, in
21 all different locations. Here, here, everywhere, and it's
22 being used in different widths and different sizes. There's no
23 evidence of any move to make it look more like anything adidas
24 is doing.

25 Adidas isn't doing that. In fact, the evidence shows

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Imburgia - Redirect

1 that adidas' trademark isn't even three stripes pushed
2 together, as you see the Grosgrain is all just one continuance,
3 pattern of stripes in different colors, red, white and blue,
4 which is not colors that adidas hasn't used any red, white and
5 blue in that way.

6 So this is a device that they've always used
7 throughout the years. It's not something that they've been
8 made to look more like adidas. There is no evidence of that,
9 your Honor. And there isn't anything --

10 THE COURT: Remind me. When Ms. Backman called Thom
11 Browne with the complaint about the three stripes, did she say
12 anything in that conversation about the Grosgrain?

13 MR. MALDONADO: There was no evidence to that effect,
14 your Honor. There was no mention of Grosgrain.

15 THE COURT: She just focused on the three -- the three
16 big stripes, for lack of a better way of putting it.

17 MR. MALDONADO: That's correct, your Honor. Even
18 though Thom Browne was using the Grosgrain at the time and that
19 was, you know, on all of its products. If she looked and did
20 the investigation like she said she did, she would have seen
21 that and discovered it. There is no evidence to support any
22 kind of egregious conduct, any kind of bad faith, or any kind
23 of use of the Grosgrain in the manner that Mr. Henn described.

24 THE COURT: All right. I will think about this for --
25 obviously, I'm going to make all the decisions before the day

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Imburgia - Redirect

1 is out. I'll think about this one a little bit more.

2 Now of the other grounds that were made on the motion
3 for a directed verdict for the defense, there was some were
4 directed at bad faith and willfulness. Remind me what your
5 position is on that.

6 MR. MALDONADO: Our position, your Honor, is that
7 there has been no evidence of bad faith here that the defendant
8 started using three bars in 2005. It used it until it was
9 contacted by adidas in 2007. The defendant then switched to a
10 four-bar mark, which it used prominently in its collection ever
11 since then, from 2007 through today.

12 adidas did not complain for ten years. The defendant
13 reached out to adidas several times. They left messages,
14 voicemail. adidas never returned the calls. So there is no
15 evidence of the defendant adopted its mark in bad faith. There
16 is no evidence that they did anything in their development of
17 their business in bad faith.

18 And they was silence on the part of adidas. They had
19 every right or every opportunity to investigate what the
20 defendant was doing. The defendant is in a different category
21 than adidas has been and continues to be operating in a
22 different category. There's never been any evidence of
23 confusion through the 15 years. There is no evidence to
24 support that the defendant was trying to trade on adidas'
25 reputation.

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1 And there's just simply, your Honor, no evidence of
2 bad faith or willfulness in this case, so we move for directed
3 verdict.

4 (Continued on next page)

5 THE COURT: All right. On that issue.

6 Let me hear from plaintiff's counsel.

7 MR. HENN: Well, on the three points that were just
8 raised by defense counsel.

9 First, there's no contention by anyone that back in
10 2007 Thom Browne was using the Grosgrain in the way we complain
11 about now on the shoes. So the idea that the fact that they
12 were using it as a little tab on the back of a suit coat and
13 adidas didn't know anything about it, there was no evidence
14 that adidas saw it. The evidence of what Ms. Backman saw --

15 THE COURT: And this goes back to our discussion a
16 minute ago on punitive damages. Is there any other product,
17 you don't need more than one -- but is there any other product
18 that you're claiming bad faith vis-a-vis the Grosgrain thing
19 other than the shoes?

20 MR. HENN: We also believe putting that Grosgrain down
21 the hem of pants and the sleeve of sweatpants, there is no
22 evidence in the record that they did that before. Yes, they
23 had it as a stripe on a helmet on a fake football player, yes,
24 they've used it in lots of different ways, but when they
25 decided to put it in the exact placement where adidas's most

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1 classic and recognized stripes are, that was a design choice by
2 Mr. Browne; that was arguably in bad faith because he's
3 testified he knew about the three stripes.

4 THE COURT: Let me interrupt you on that just to get
5 the response on that to the shoes and the sweatpants.

6 MR. MALDONADO: So, your Honor, with regards to the
7 sweatpants, you know, as you've seen in the evidence in the
8 record, there's others that use stripes on the sweatpants, and
9 the stripes that our client uses are not like adidas's. The
10 Grosgrain is totally different than the stripes that they used,
11 and we've seen that in the evidence of the record. There's no
12 evidence that -- the designer of the sweatpants was on the
13 stand. There was no examination as to his intent, what he was
14 trying to do when he designed the sweatpants, was he trying to
15 mimic adidas or copy adidas. There was no examination to that
16 regard. There was no evidence to that regard. So there's no
17 evidence that there was any bad faith on the part of the client
18 in using these decorative elements that it's used in all
19 positions throughout its clothing, throughout -- for more than
20 a decade now, your Honor.

21 And with respect to the shoes, again, the evidence
22 showed that this was a limited quantity item; that they've used
23 different items of shoes, different types of shoes. You know,
24 whether it's called a running shoe or the words that are used
25 to describe the shoe is not really relevant to the question of

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1 bad faith. It's just a shoe that costs an enormous amount of
2 money. It's sold by a luxury designer, but people don't go to
3 luxury designers to buy running shoes. So it's just a word to
4 describe the shoe the way it looks, and it's not a functional--

5 THE COURT: How much did the shoes cost?

6 MR. MALDONADO: \$900, your Honor.

7 Anyway, for all of those reasons, we don't think
8 there's any bad faith with regards to the shoe or the stripes
9 down the pants.

10 MR. HENN: The one last thing I wanted to mention on
11 this because I didn't finish what I was talking about before,
12 counsel mentioned that one of the reasons he thinks a directed
13 verdict would be appropriate on these issues is because they're
14 in a different category, but that gets to the heart of one of
15 our key components of bad faith and willfulness story. Adidas
16 objects in 2018, spring of 2018. In 2020 the line of
17 compression products is released, the full line, the very
18 products that Mr. Poret's survey that show enormous levels of
19 confusion.

20 In a trademark case if you get over 12 percent in a
21 survey, that's enough. He's getting numbers in the thirties or
22 twenties. I think anyone would have known that was egregious.
23 And then to offer them as running products and performance
24 products, that is bad faith. If after adidas'S objection they
25 had a legitimate complaint about the fact that, oh, we've been

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1 swelling gray sweatpants for a long time, let's fight that out,
2 let's take it to the court. But to expand further after the
3 objection -- that's the *Victorinox* case. To expand further
4 after the objection is raised, that's evidence of bad faith.
5 You can't enter a directed verdict when evidence of that
6 exists.

7 THE COURT: So what about the fact when the designer
8 of the shoes was on the stand, he was never confronted with
9 your accusation that he did this purposely to infringe or take
10 advantage of the confusion, alleged confusion over adidas.

11 MR. HENN: As your Honor is well aware, and the case
12 law is replete with the statement that willfulness and bad
13 faith may be determined by the jury based on circumstantial
14 evidence. There is no requirement that I ask a direct question
15 of a witness: Did you ask in bad faith, because no witness
16 would ever say, "Yes, I did." So the way that bad faith is
17 proven in a trademark case is you lay out the case. These are
18 our rights. This is what they did. This is the timeline.
19 They knew of our objection, and they did it anyway.

20 And then the jury can look at that evidence and decide
21 for themselves based on the facts that have been presented, the
22 circumstantial evidence, whether that rises to a level of
23 turning a blind eye, consciously disregarding adidas's rights,
24 or in the case of moving directly into compression products,
25 trying to trade on some of the good will.

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1 MR. MALDONADO: Your Honor, three points. One with
2 respect to the compression pants, as your Honor knows, the
3 evidence shows that the defendant Thom Browne has been selling
4 sweatpants since 2010. The difference between compression
5 pants and sweatpants is that compression pants are tighter.
6 It's just a natural expansion of his product line. We don't
7 believe it's anything in bad faith.

8 Second, Mr. Becker testified that when they switched
9 from three to four, that he would not have done that if he had
10 not thought that it would cause more problems with adidas. It
11 was done in good faith. It was not done in bad faith.

12 And, third, and I think most importantly, for the
13 question of willfulness, as your Honor mentioned yesterday,
14 there's absolutely no evidence in the record that Thom Browne
15 thought that anything he was doing was infringing. It did not
16 have knowledge that there was infringement. It did not think
17 there was infringement. Adidas was silent. They never said
18 anything. It had every reason to think that there was no
19 infringement. So, without that, your Honor, there is no basis
20 for a willfulness claim to go forward.

21 THE COURT: All right. Now, remind me, defense
22 counsel, of some of the other more particular grounds you gave
23 for your motion to dismiss.

24 MR. MALDONADO: Other --

25 THE COURT: Yes. It's a lot less and I did not copy

N1BQadi2

1 it down.

2 MR. MALDONADO: We had disgorgement of profits was
3 another ground, but there was no basis to disgorge profits
4 under the *Romag* case.

5 DEPUTY CLERK: Spell it.

6 MR. MALDONADO: R-O-M-A-G.

7 THE COURT: Because?

8 MR. MALDONADO: Because of the -- because of the lack
9 of willfulness, your Honor.

10 THE COURT: Yes. So, but that would go, at most -- as
11 many of these points do -- not to dismissing the entire claim
12 but just to narrowing it. Okay.

13 MR. MALDONADO: Next, we had initial interest
14 confusion, your Honor. I don't believe there was any evidence
15 presented by plaintiff on their theory of initial interest
16 confusion, so that is a theory that we think should not go to
17 the jury.

18 THE COURT: Let's hear plaintiff's counsel on that.

19 MR. HENN: Shall I address the profits one and initial
20 interest?

21 THE COURT: Yes, sure.

22 MR. HENN: I'm not sure what counsel is referring to
23 with regard to *Romag* requiring willfulness, since the whole
24 point of *Romag* was to removal willfulness as a requirement.
25 The Second Circuit used to require willfulness for profits.

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1 Supreme Court finally made unanimity across the circuits by
2 saying willfulness is not required for profits, and so, if
3 anything, *Romag* shows why the --

4 THE COURT: Except for dilution.

5 MR. HENN: Correct. But as your Honor probably noted
6 in our proposed jury instructions, we are only seeking monetary
7 relief for infringement.

8 THE COURT: That's what I did think, and that's why I
9 put in my charge --

10 MR. HENN: And I assumed that's why you were asking
11 the question of Mr. Ibrugia --.

12 THE COURT: Yes, I just wanted to be absolutely sure.
13 Okay. Good. So I'm glad we've clarified that.

14 So, but I think you're right that willfulness is no
15 longer required for infringement lost profits.

16 MR. HENN: There was also -- he didn't mention it just
17 now, but he had also moved to exclude our reasonable royalty
18 calculation. Do I need to address that or are you --

19 THE COURT: Sure.

20 MR. HENN: I mean, obviously, many trademark cases
21 have accepted reasonable royalties as a stand-in for damages,
22 but damages experts talked about how many cases they've been in
23 where they've done exactly that, including the *Payless* case
24 that I mentioned earlier. That was a case where reasonable
25 royalties were awarded in a trademark case.

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1 THE COURT: Yes, I went back and looked at that case I
2 thought it was brilliant.

3 MR. HENN: Thank you. Judge King was an excellent
4 judge.

5 With regard to initial interest confusion, so counsel
6 seems to -- let me back up.

7 The way these issues get to the jury is based on
8 Polaroid factors. Those factors don't mention initial interest
9 for post sale or point of sale. The issues, the facts and the
10 evidence that comes in is as to how similar are the marks, how
11 similar are the products, you know, what are your channels,
12 what are your consumers, all those things.

13 Then the jury is allowed, unless a plaintiff, as we
14 have here, pulled back one of the theories -- the jury is
15 allowed to consider that evidence in all three time frames.
16 They can consider it presale, they can consider it post sale,
17 and they can consider it point of sale. Here, no point of
18 sale, but it's not as though we need separate evidence on
19 Polaroid factors with regard to initial interest and Polaroid
20 factors with regard to post sale; it's the same evidence on
21 Polaroid factors. They are just permitted to consider it in
22 those two contexts. And so there are -- to the extent the jury
23 wanted to look for evidence of initial interest confusion in
24 opening and again in closing, I will point out that what we are
25 arguing with regard to initial interest confusion is that there

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1 are two scenarios where that is likely. One is social media.
2 There have been gobs of social media posts put in front of the
3 jury showing Thom Browne's products, showing celebrities
4 wearing the product, showing celebrities wearing the products
5 with adidas shoes. So there is evidence from which a jury
6 could conclude that in the context of social media someone
7 seeing that would be confused.

8 The other one is there's been --

9 THE COURT: An alternative theory is celebrity will
10 wear anything if you pay him enough.

11 MR. HENN: For sure.

12 The other scenario in which we've alleged initial
13 interest confusion is likely is in the context of these retail
14 stores where they do have overlapping sales. Both parties put
15 in a lot of evidence about the fact that these parties'
16 products appear at, say, Nordstrom. And our argument is when
17 you're walking through Nordstrom, there is a time that initial
18 interest presale phase where the products are over there, and
19 you're walking into the store, and from a distance, just as we
20 see on this rack, a consumer could see those stripes and think,
21 oh, that's some neat adidas stuff, and walk over. When they
22 get there, of course, they see the Thom Browne tag, and the
23 probably see the price tag and faint, but from a distance they
24 thought it was adidas. The jury can conclude that based on the
25 evidence of -- voluminous evidence of the fact that the

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1 parties' products exist in the same retail locations.

2 THE COURT: Let me ask you something else before I
3 forget. It's off the subject of what we are now discussing,
4 but we talked about it a little bit yesterday.

5 Willfully, is willfully still in the case just as a
6 technical matter. It's not in the case as to laches because
7 I'm going to decide that -- if it's in the case there, I'll
8 decide it, but it's not for the jury. It's not in the case as
9 to dilution damages because you're not claiming dilution
10 damages, just injunctive relief.

11 MR. HENN: Right.

12 THE COURT: But there was a third item that I think
13 you mentioned, and I just forgot.

14 MR. HENN: It relates to this *Romag* situation.

15 So the Supreme Court said willfulness is no longer a
16 prerequisite to profits, but that it is still a factor that may
17 be considered in an award of profits. And so it would be in
18 the case to the extent defendant wanted to make the argument
19 that --

20 THE COURT: Well, assuming you persuade me to put in
21 under the Polaroid factors, the bad faith factor, wouldn't that
22 really be sufficient for your purposes? I mean, do you need --
23 are you saying I have to have a separate instruction under
24 damages that in determining damages you can also look at bad
25 faith?

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1 MR. HENN: That would probably suffice in terms of the
2 bad faith interaction with the profits assessment.

3 THE COURT: All right. So in that regard, I'll ask my
4 law clerk just to go get a couple copies of the revised charge.
5 This is not the final charge at all, obviously, but just to
6 reflect the rulings that were made this morning.

7 MR. MALDONADO: Your Honor, we also agreed to include
8 bad faith in Polaroid factors.

9 THE COURT: That's good because I put it into my new
10 version. My law clerk will go get that for you now.

11 No, what else?

12 MR. MALDONADO: What other grounds?

13 With respect to the reasonable royalty as a proxy for
14 damages, we believe that that is limited in cases where there's
15 some sort of relationship between the parties, such as a
16 holdover licensee or franchisee, and in this case, of course,
17 there's no relationship between the parties.

18 So, getting back initial interest confusion again,
19 there's no evidence of initial interest confusion. We don't
20 believe that the products being available in the same store is
21 enough to satisfy the evidentiary requirements for initial
22 interest confusion. It has to be a consumer who sees Thom
23 Browne's products and are unfamiliar with Thom Browne's
24 products, sees them, and believe that they're adidas products.

25 THE COURT: I'm sorry, what's the guy, Poirot, or

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1 whatever his name was?

2 MR. HENN: Poret.

3 THE COURT: Poret, thank you. His study was limited
4 to post sale?

5 MR. MALDONADO: That's correct, your Honor. That was
6 a post-sale environment. They didn't put any studies related
7 to initial interest. He said he didn't consider initial
8 interest. And there's no expert or fact witness who testified
9 as to initial interest confusion in this case, so we believe
10 that that should not be presented to the jury.

11 THE COURT: Here is what I think makes sense. I am
12 going to grant the motion to dismiss the punitive damages
13 claim. I am going to deny the motion to dismiss any of the
14 other claims. But we will take up the specific, more narrow
15 objections you have as they come up in the charge. I think
16 really that's the best way to handle it, so -- because, for
17 example, I no longer need to confront whether bad faith should
18 be listed as a Polaroid factor because both counsel have
19 agreed.

20 On the other hand, I'm leaning on not saying anything
21 about willfully, given that two of the respects in which it was
22 relevant are now no longer part of the jury instructions, but
23 these are more narrow questions that as we go through each, so
24 I'll give you all -- my law clerk will bring up the new version
25 in about two minutes, and I'll give you a break, and you can

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1 look at that, and then we can resume.

2 MR. HENN: I have to tell you, this is a first
3 procedurally. I just don't want to waive anything. I had
4 intended to move for a directed verdict JMOL on the laches
5 defense. Now that you've taken it back, and if we did move for
6 summary judgment, I feel like I need to renew it just to
7 preserve that issue.

8 THE COURT: If you need to renew it, you have now
9 renewed it.

10 MR. HENN: Thank you. I just want to make sure I'm
11 not waiving anything.

12 THE COURT: But all the laches questions -- of course,
13 if the jury finds no liability, I don't reach it. But assuming
14 they find liability, then what I will probably ask you both to
15 do is give me a short written summation, in effect, on laches.
16 Maybe I'll set a schedule for that after the jury brings in
17 their verdict. I want to do it in the next, you know, week
18 while it's all fresh in my mind, but I don't think -- I think
19 it's clear that there are genuine issues of fact going both
20 ways on that, so neither side gets to remove it totally unless
21 the jury removes it by finding no liability.

22 Very good. We'll see you all in, why don't we say,
23 ten minutes.

24 (Recess)

25 (In open court)

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1 THE COURT: Just to elaborate a little bit further
2 on my ruling dismissing the punitive damages, I'm not sure the
3 relevant case law is summarized in a decision of the New York
4 Court of Appeals. The punitive damages is being sought under
5 New York law at *Rocanova v. Equitable Life Assurance Society*,
6 and reported at 634 N.E. 2d 940. And I won't go through all
7 the citations, but the Court says that punitive damages are
8 available only where there is a "high degree of moral
9 turpitude" demonstrating "such wanton dishonesty as to imply a
10 criminal indifference to civil obligations," plus the conduct
11 must be "aimed at the public generally."

12 Even if we could construe a Lanham Act violation as
13 being aimed at the public generally, which I think is much too
14 broad an interpretation of the Lanham Act or of New York Law
15 for punitive damages, there is not here, I think, any material
16 evidence of such wanton dishonesty and criminal indifference,
17 et cetera, that would warrant sending that matter to the jury.

18 Let's turn to the new revised instructions of law.

19 MR. MALDONADO: Your Honor, before we get started, I
20 just wanted to preserve our objection in the record to the
21 deletion of the laches instruction from the jury instruction.

22 THE COURT: The deletion of the?

23 MR. MALDONADO: The laches instruction from the jury
24 charge. We believe that there are subsidiary factual issues
25 that should be decided by the jury, at least at a minimum as an

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1 advisory verdict for the --

2 THE COURT: No, I think that's clearly not the law.

3 MR. MALDONADO: I just want to say that we believe
4 there are issues for the jury in accordance with your Honor's
5 decision on our motion for summary judgment where you did hold
6 that there were issues of fact for the jury, and we believe
7 that those issues of fact as to when -- at least as to when
8 adidas knew or should have known that it had to prove an
9 infringement claim, that that should be an issue that the jury
10 at least weighs in on.

11 THE COURT: So as I -- let me start again.

12 If an issue is for the Court, that includes, of
13 course, all relevant fact-finding by the Court, otherwise the
14 distinction between matters of law that are for the jury and
15 equitable matters that are for the judge would be meaningless
16 because there are always going to be some facts that need to be
17 found. So it's the judge who makes the findings of fact.

18 That doesn't mean to say that the judge can't, if he
19 or she wishes, have the benefit of an advisory verdict, and
20 that was originally the route I was going, but I decided that
21 was imprudent. It also doesn't mean that there aren't factual
22 issues that may also be part of other claims that will be
23 decided by the jury, but those decisions by the jury on those
24 other claims are not binding on the Court on the equitable
25 claims. They are just, again, advisory, in effect, so I

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1 respectfully disagree with -- and if I said anything to the
2 contrary in my summary judgment opinion, which I don't think I
3 did, but if I did, well, then shame on me, but I reject it.

4 MR. MALDONADO: Thank you, your Honor.

5 THE COURT: Now, with respect to the latest version of
6 the charge. Let's deal first with general instructions 1
7 through 8. These are basically my standard form instructions,
8 but let me hear from either side, beginning with plaintiffs,
9 whether either there is anything you object to, anything you
10 want to offer edits on, or anything you want to add to the
11 general instructions of 1 through 8.

12 MR. HENN: Your Honor, just a stylistic thing. I
13 don't want to show any disrespect, but given all the writing
14 we're going to be doing, do you mind if we do the charge
15 conference seated?

16 THE COURT: No. No. Go ahead. Absolutely. Please.

17 MR. HENN: With regard to instructions 1 through 7, I
18 think those are fine, and we have no objections to them.

19 The only objection, or suggested change, really, in
20 instruction 8 is that defendants did not call Brian Sowers, so
21 should not be listed as an expert witness.

22 THE COURT: Okay. Thank you very much.

23 MR. HENN: They did call a couple of experts who
24 probably should be listed.

25 THE COURT: Let me get the exact list. I was doing

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1 this. So for adidas, it's Hal Poret, Erich Joachimsthaler and
2 John Plumpe, right?

3 MR. HENN: That's correct.

4 THE COURT: For defense, it was Hannah Arbuckle and--

5 MR. LEWIN: Your Honor. Marie McKiernan for the
6 record.

7 THE COURT: I'm sorry?

8 MS. McKIERNAN: Marie McKiernan for Thom Browne.

9 THE COURT: I'm not going to list your name as an
10 expert even though I know you are.

11 MS. McKIERNAN: I was going to spell it for the
12 record, your Honor. Last name is M-C-K-I-E-R-N-A-N.

13 For Thom Browne, the experts to list would be JoAnne
14 Arbuckle, not Hannah.

15 THE COURT: Thank you very much. Excellent.

16 MS. McKIERNAN: In addition, Joel Steckel.

17 THE COURT: Hold on just one second. What was
18 Mr. Steckel's first name.

19 MS. McKIERNAN: Joel, J-O-E-L.

20 THE COURT: And Mr. --

21 MS. McKIERNAN: Mr. Basil Imburgia, I-M-B-U-R-G-I-A.

22 THE COURT: So it's JoAnne Arbuckle, Joel Steckel,
23 S-T-E-C-K-E-L. And what was Mr. Imburgia's first name?

24 MS. McKIERNAN: Basil, B-A-S-I-L.

25 THE COURT: I-M-B-U-R-G-I-A. Thank you very much.

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1 MR. HENN: Your Honor, with regard to that list,
2 plaintiffs object to the inclusion of Ms. Arbuckle. Since your
3 Honor excluded her from offering any opinions, she really isn't
4 being offered and in the end did not give any expert opinion or
5 expert testimony.

6 THE COURT: Well, that's true, but as you can see from
7 this instruction, I call these folks specialized witnesses, and
8 she was specialized. And, indeed, we learned without objection
9 not only how she conducted her search but also that she was the
10 dean of the finest fashion institute in the world, so I'm going
11 to leave it as is.

12 All right. Anything from defense counsel on
13 1 through 8?

14 MS. McKIERNAN: No, your Honor.

15 THE COURT: Thank you.

16 Now turning to numbers -- I think here we have to go
17 individually. Number 9, any addition from plaintiff's counsel?

18 MR. HENN: No, your Honor.

19 THE COURT: Defense counsel?

20 MS. McKIERNAN: No, your Honor.

21 THE COURT: Number 10.

22 MR. HENN: A couple of things. Let me start with the
23 easiest. The exhibits that are referenced in the current
24 instruction were not offered or received. The registrations
25 were compiled in two exhibits, Exhibit 181 --

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1 THE COURT: I'm sorry, the registrations are -- go
2 ahead.

3 MR. HENN: If you look right in the middle of the
4 instruction, it references some exhibits in the 700s.

5 THE COURT: Right. What's the right number?

6 MR. HENN: The correct numbers are 181 and 183 with
7 one clarification, which I've discussed with defense counsel,
8 which is that 183 included in it two registrations at the very
9 end that are not being asserted in the case, and so when we
10 send that exhibit back, presumably as part of this or as part
11 of the record, we've agreed --

12 THE COURT: Well, does 181 have all of them except for
13 the ones that are in 183?

14 MR. HENN: 181 has apparel and 183 has footwear.

15 THE COURT: Okay, but all 17 are there?

16 MR. HENN: Correct.

17 THE COURT: And the two that are not being asserted
18 are?

19 MR. HENN: At the very end of 183. We'll just redact
20 that.

21 THE COURT: That works for both sides? Good. Okay.

22 MR. HENN: So our other issues with regard to the
23 proposed instruction number 10, the first relates to the second
24 sentence, the sentence that begins "For the purposes of this
25 case."

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1 THE COURT: Yes.

2 MR. HENN: Right now, it says, "adidas' Three-Stripe
3 Mark means its use of three parallel stripes on clothing or
4 shoes in the manner described and shown in a number of federal
5 trademark registrations."

6 It's adidas's position that that should --

7 THE COURT: It should be just described?

8 MR. HENN: Yes. Or, actually, what it should say is
9 "the use of three parallel stripes on clothing or shoes,
10 certain executions of which are shown in a number of
11 registrations."

12 MS. McKIERNAN: Your Honor?

13 THE COURT: Yes.

14 MS. McKIERNAN: We believe that the language there
15 should remain the same, as the preceding sentences clearly
16 address the unregistered uses of the three -- or executions of
17 the Three-Stripe Mark.

18 THE COURT: Yes, I think the description -- my
19 recollection is, for example, as to color, which is one of the
20 issues that came up. I think the registrations on the face say
21 can be any color.

22 MR. HENN: Correct.

23 THE COURT: So why isn't it enough to say in the
24 manner described -- I think "shown" should maybe be replaced
25 with "exemplified" or some word like that.

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1 MR. HENN: That could work. The issue we have is not
2 whether you use the word "shown" or "described," but rather in
3 its current proposed form, it necessarily suggests a limitation
4 on what the Three-Stripe Mark is because it says, "It's three
5 stripes in the manner described or shown in the registrations,"
6 and as the Court is well aware --

7 THE COURT: But then the next sentence goes on to say
8 "and" et cetera.

9 MR. HENN: Right, which is why I'm trying to avoid a
10 sentence that seems to contradict the next sentence.

11 THE COURT: I don't think it's contradictory. But I
12 will change "shown" to "exemplified."

13 And then the next sentence I think makes exactly the
14 point you want to make. "it also includes any other use by
15 adidas of three parallel stripes on clothing or shoes that you
16 find gives consumers the same commercial impression as any one
17 or more of the registered uses." I think that's more than
18 sufficient for your purposes.

19 Any other plaintiff's objection?

20 MR. HENN: Yes. With regard to the final sentence,
21 the language that references "differing materially" we do not
22 believe is supported in the relevant case law. We believe that
23 after the second hyphen, it should read: "If you find that the
24 use would be perceived to have the same commercial impression
25 by a reasonable consumer." So you would strike the portion

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1 that reads "does not differ materially from one or more of the
2 registered uses and," and you would delete "in the same way"
3 because in connection with assessing commercial impression, the
4 jury is not supposed to look at a use and look at a
5 registration and make an assessment on whether they as drawn
6 are materially different or are the same, but rather are
7 supposed to use the evidence presented to them to assess
8 whether they think consumers in the marketplace would perceive
9 those in the same commercial way.

10 THE COURT: The last part is in here. Just so the
11 record is clear, after that sentence we just read, the
12 following sentence is, "By this, I mean that you may find that
13 a particular use of three parallel stripes by adidas falls
14 under its Three-Stripe Mark -- even if it differs in some way
15 from the use of three stripes in any of the federal
16 registrations -- if you find that the use does not differ
17 materially from one or more of the registered uses and would be
18 perceived in the same way by a reasonable consumer."

19 So I think the second part of what you were asking for
20 is there in the second part of the clause.

21 But looking at the first part -- by the way, this
22 language is by *McCarthy* on trademark, but that's just neither
23 here nor there.

24 I think maybe it should simply say -- but I want to
25 hear from defense counsel on this -- "By this, I mean that you

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1 may find that a particular use of three parallel stripes by
2 adidas falls under its Three-Stripe Mark -- even if it differs
3 in some way from the use of three stripes in any of the federal
4 registrations -- if you find that it would be perceived in the
5 same way by a reasonable consumer."

6 MR. HENN: That's what it should say.

7 THE COURT: All right. Let me see if there is any
8 objection to that from defense counsel.

9 MS. McKIERNAN: Your Honor, we don't have an
10 objection.

11 THE COURT: Great. Anything from defense counsel on
12 the revised number 10.

13 MS. McKIERNAN: No, your Honor.

14 THE COURT: Very good.

15 On to 11. Anything from plaintiff's counsel on 11?

16 MR. HENN: Yes, your Honor. A minor point. There are
17 two plaintiffs so it probably should be plural possessive as to
18 plaintiffs' exhibits.

19 THE COURT: I'm having trouble hearing you.

20 MR. HENN: Sorry. There are two plaintiffs in the
21 case, and --

22 THE COURT: Yes. Yes. Yes.

23 MR. HENN: It represents plaintiff's singular. It's a
24 minor point, but we might as well clean it up.

25 THE COURT: All right.

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1 MR. HENN: First paragraph.

2 THE COURT: Don't we define earlier. And then we did
3 in the preliminary instruction. Maybe we should -- okay.

4 MR. HENN: That's actually one of our suggestions,
5 your Honor. It seems sometimes there's a reference to --

6 THE COURT: On instruction 9, going back to that first
7 sentence "With these general instructions in mind, let me now
8 turn to the two claims in this case that the plaintiffs',
9 adidas America, Inc. and adidas AG (Hereinafter collectively
10 referred to as 'adidas')," right? That's what you want?

11 MR. HENN: Sure. Well, and as to the reference to the
12 exhibits, there are several places later in the instruction
13 where the proposed instruction uses phrases like "the relevant
14 products," it might help clarify for the jury when that phrase
15 is used -- or we've in discussing it with witnesses and
16 discussing it in our openings, I believe both sets of counsel
17 referred to them as the "accused products." That might be
18 better than "relevant products."

19 THE COURT: Well, in the instruction 11 in the
20 third -- excuse me -- in the second sentence of the first
21 paragraph, it says, "You can review the specific Thom Browne
22 products that adidas accuses of infringement in Plaintiff's
23 Exhibits 55 and 56.

24 MR. HENN: And so my suggestion is to then do a
25 similar defined term at that point and define them -- you can

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1 define them as the "accused products" as we have been doing
2 throughout the trial, or I think in other places --

3 THE COURT: Tell me the line and the specific language
4 you want.

5 MR. HENN: Sure. After the number 56, you have
6 "(hereinafter collectively referred to as the 'accused
7 products')." And then we would just make sure we go through
8 the various places where now it either just says "products" or
9 "sell products" or the "relevant products" and we streamline it
10 to just all say "the accused products."

11 THE COURT: Now, I thought you were going to mention
12 on the second paragraph.

13 MR. HENN: I'm getting there.

14 THE COURT: The third line, the sentence beginning "As
15 you heard," it says "adidas does not conted" whereas it should
16 be "contend," and I will take this up privately with my law
17 clerk.

18 MR. HENN: As you should.

19 Actually, our objection in that paragraph pertains to
20 the first sentence --

21 THE COURT: Go ahead.

22 MR. HENN: -- it currently references "likelihood of
23 confusion as to source," which would be the products are made
24 and sold. And it references "approved by," but as you're
25 aware, Section 43(a) extends beyond mere approval, and so that

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1 sentence should say "or otherwise connected with, associated
2 with, sponsored by or approved by adidas." And that's the
3 statutory language.

4 THE COURT: Give me those again.

5 MR. HENN: Sure. "Connected with, associated with."

6 THE COURT: What's the difference between connected
7 and associated?

8 MR. HENN: You have to take that up with Congress,
9 your Honor. Those are by statute.

10 THE COURT: I'm not required to. Congress typically
11 gives, a laundry list of, in effect, of synonyms. My aim is to
12 make sure the jury is not confused.

13 MR. HENN: So "connected with" is typically used if
14 there is a belief that the defendant may be operating in
15 connection --

16 THE COURT: All right, anyway, I will -- just move
17 things along, "connected with, associated with," what's the
18 rest?

19 MR. HENN: "Sponsored by."

20 THE COURT: I'm sorry?

21 MR. HENN: And then it would also just be "approved by
22 adidas."

23 THE COURT: Or "approved by."

24 Anything else on 11 from plaintiffs?

25 MR. HENN: Yes, just sort of grammatically. Oh, on

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1 all of 11? Yes. Let me look through them.

2 So in that same paragraph, after "post sale," to track
3 what was said immediately prior, I would suggest a comma and
4 the word "such" so that it tracks what you said in presale.

5 And then where it says "Thom Browne customers saw," it
6 should say "see."

7 THE COURT: I'm sorry, what's the language you want?

8 MR. HENN: It says "saw," which suggests in the past
9 it has occurred, and it should say "see" because this is about
10 likelihood.

11 THE COURT: So what's the language you want?

12 MR. HENN: Change the word "saw" to "see."

13 THE COURT: To?

14 MR. HENN: "See," S-E-E.

15 THE COURT: Okay.

16 MR. HENN: Then our next objection/suggestion is in
17 the paragraph that begins "second."

18 THE COURT: By the way, we will get to defense counsel
19 in a minute. But, of course, this paragraph raises the
20 question of presale versus post sale, but we'll get to that in
21 a minute. Go ahead.

22 MR. HENN: The next objection is in the paragraph
23 beginning "second."

24 THE COURT: Yes.

25 MR. HENN: So there is an inconsistency in the

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1 instructions as currently presented with regard to how you're
2 going to refer to Thom Browne's designs. Sometimes it's
3 referred to as "designs;" sometimes it's referred to as
4 "signatures." It should be consistent.

5 THE COURT: Which one do you want?

6 MR. HENN: Our preference is "designs."

7 THE COURT: Okay. That's fine with me.

8 Now, here and with respect also to the accused
9 products, we will indeed go through and fix all of this, and I
10 will get you sometime this afternoon the final, but "subject
11 only to," things like that.

12 MR. HENN: Our next objection in that paragraph we
13 will touch on later as well, but these instructions use
14 language that presumes we are alleging point-of-sale confusion
15 in a few places. So, in a case involving --

16 THE COURT: Just tell me -- I need to know -- as I
17 indicated yesterday, I want to know where you are objecting,
18 what language you are objecting to and what language you would
19 substitute.

20 MR. HENN: It says in the paragraph beginning with the
21 word "second," it refers to "prospective purchasers."

22 THE COURT: Okay.

23 MR. HENN: It does it twice.

24 THE COURT: So you would substitute?

25 MR. HENN: "Consumers."

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1 THE COURT: Pardon?

2 MR. HENN: "Consumers." It could either be
3 substituted or --

4 THE COURT: Consumers is fine.

5 MR. HENN: The paragraph that is suggested that begins
6 with "third" should be replaced. Competition referred to cases
7 not involving point of sale confusion is held to be not as
8 relevant. We propose using adidas's suggested language from
9 its proposed instructions that were submitted previously.

10 THE COURT: Which is what?

11 MR. HENN: Which is as follows: It would say, "Third,
12 you should consider the competitive proximity of parties'
13 products. In other words, you should compare adidas's
14 Three-Stripe Mark products with the accused products and
15 consider how similar the products are, whether they are sold in
16 the same or similar channels, and whether they are promoted
17 through similar advertising media. Products that are similar
18 or that are sold or advertised in similar channels are more
19 likely to be confused than those used in connection with
20 unrelated or non-proximate products."

21 THE COURT: I'm not going to give you all of that.
22 That is endless and confusing. But I'm not quite sure what
23 your objection is to the language I have.

24 MR. HENN: Well, so competition is pertinent if you're
25 talking about a purchaser who is going to buy a product and

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1 might accidentally pick up the wrong one because they're on the
2 same shelf.

3 In the case of initial interest and post-sale
4 confusion, it's not a competition. It's about how proximate
5 they are in the marketplace. Are they likely to encounter
6 these products because they're similar goods? Are they near
7 each other in terms of advertising media? Are they near each
8 other in terms of what stores they might be in? So,
9 competition is overly limiting given the theory that we're
10 presenting to the jury.

11 THE COURT: I'll think about it. I'll put the
12 question mark for a moment.

13 MR. HENN: In the paragraph that begins with the word
14 "fourth, we believe that it would be appropriate to add a
15 sentence indicating to the jury that survey evidence is
16 evidence of actual confusion.

17 (Continued on next page)

N1BsADI3

Charge Conference

1 THE COURT: No. I don't normally, in any instruction,
2 single out any particular form of evidence. If it's in
3 evidence, it's in evidence.

4 If there were some special instruction that would be
5 given, I would only consider it for this, but not for that.
6 That would be a different story. That's not the case here.

7 I'm not going to make that change.

8 MR. HENN: Our next objection is in regard to the
9 paragraph that begins sixth. This includes and is largely
10 designed for point-of-sale confusion. So this talks about the
11 word at the end of the first line where it says. The care that
12 a consumer would use in purchasing. Since we're not alleging
13 point-of-purchase confusion --

14 THE COURT: OK. All right.

15 MR. HENN: -- as opposed to in purchasing, replace
16 that.

17 THE COURT: So you want to change that to comparing?

18 MR. HENN: When encountering.

19 THE COURT: Pardon?

20 MR. HENN: When encountering.

21 THE COURT: All right. I'll hear from your adversary
22 in a minute, but for the moment that sounds...

23 MR. HENN: The final sentence should be deleted
24 entirely. Again, cost and price are not relevant to claims of
25 initial interest post-sale confusion.

1 THE COURT: Why is it not the case that people pay
2 more attention to what they are buying when they are spending a
3 million dollars as opposed to five cents?

4 MR. HENN: It's absolutely the case when they are
5 buying. But remember, we're not talking about confusion when
6 they are buying.

7 THE COURT: I see.

8 MR. HENN: But this is when they are seeing it across
9 the stores, they are not anywhere near the purchase moment yet,
10 or when they are out on the street walking by someone.

11 THE COURT: OK. I think that's a good point. I will
12 at least tentatively, except to hear from your adversary,
13 strike that.

14 MR. HENN: Those are all our objections.

15 THE COURT: In the new paragraph I added on bad faith,
16 which is in the version you now have, but wasn't in the form I
17 gave you yesterday. I say, or chose to turn a blind eye to the
18 possibility that consumers would be confused.

19 I think that is not the law. I think I would change
20 that to read, or purposely chose to turn a blind eye to the
21 high likelihood that consumers would be confused.

22 MR. HENN: We have no objection to that change.

23 THE COURT: Pardon?

24 MR. HENN: We have no objection to that change.

25 THE COURT: Very good.

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Charge Conference

1 Let's turn to defense counsel on all of number 11.

2 MS. MCKIERNAN: Your Honor, we're OK with a short --
3 defining the accused products so that it's clear.

4 THE COURT: OK.

5 MS. MCKIERNAN: As the scope and bounds of what is
6 being accused.

7 With regard to, we would like the word occurred to be
8 changed to occurs.

9 THE COURT: I'm sorry. Where are we talking about.

10 MS. MCKIERNAN: In the second paragraph.

11 THE COURT: You want to change.

12 MS. MCKIERNAN: Occurred to occurs, to make it present
13 tense.

14 THE COURT: Oh, occurs.

15 OK. That's good. I like that.

16 MS. MCKIERNAN: What we would like to raise here is
17 the issue that we raised earlier.

18 THE COURT: The big issue --

19 MS. MCKIERNAN: Yes.

20 THE COURT: -- in this pre-sale versus post-sale.

21 Let me just get everything else you have on 11, if
22 anything, and then we'll turn to that.

23 MS. MCKIERNAN: We'll turn back to that. We prefer
24 that, in terms of the bottom of the page here for second, where
25 it is beginning at the second.

N1BsADI3

Charge Conference

1 THE COURT: I'm sorry?

2 MS. MCKIERNAN: So plaintiff has requested, in the
3 bottom paragraph of page 15, that the signatures be changed to
4 designs. We would like it to remain signatures, as that is the
5 testimony heard from Thom Browne witnesses as how it is
6 referred to in the ordinary course.

7 THE COURT: I think signatures does not in everyday
8 discourse mean what you take it to mean and, therefore, I think
9 the everyday Webster use of language would be, I think, closer
10 to design than it would be to signature.

11 I'm going to leave it at design.

12 MS. MCKIERNAN: OK, your Honor.

13 THE COURT: OK. Now let's talk --

14 I'm sorry. Was there anything else?

15 MS. MCKIERNAN: With regard to the third paragraph, we
16 would like to leave the language there compete for the same
17 consumers.

18 THE COURT: Well, I think we use consumers everywhere
19 else, so consumers -- and I don't think there is a meaningful
20 difference between consumers and purchasers.

21 Pardon?

22 LAW CLERK: It's the compete for language.

23 THE COURT: Oh, I'm sorry, on third. I am completely
24 missing. I was looking at second.

25 OK. Yes. I'm still inclined to keep that in. I

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1 agree.

2 MS. MCKIERNAN: Your Honor, my apologies. With regard
3 to the second paragraph and plaintiff's request to remove
4 reference to perspective purchasers, we believe that --

5 THE COURT: No, no. They just wanted to change
6 purchasers to consumers. They made two changes on second. One
7 they wanted to change signatures to design, which I agree with,
8 and then they wanted to change perspective purchasers to
9 perspective consumers, which I also agree.

10 MS. MCKIERNAN: With regard to that, your Honor, we
11 believe the prospective purchaser language is more proper here.
12 While point-of-sale confusion is off the table, the --

13 THE COURT: What is the difference?

14 Please explain to me what is the difference between a
15 purchaser and a consumer in the context of this case.

16 MS. MCKIERNAN: So consumer appears -- is broader and
17 prospective purchaser is to -- what plaintiff's original
18 proposed jury instructions pointed out, that while
19 point-of-sale confusion is not at issue here, you can still
20 consider point-of-sale. And it may just be less important in
21 assessing the *Polaroid* factors. It was listed as their eighth,
22 the eighth point in their proposed jury instructions on this
23 point.

24 THE COURT: Well...

25 MS. MCKIERNAN: And the harm for a trademark owner

1 would be the prospective purchase.

2 THE COURT: You understand the abstract point that
3 consumer is broader than purchaser, but I don't know why it is
4 different in the context of this case. If we did that, in all
5 places you would change consumers to purchasers?

6 MS. MCKIERNAN: Yes, your Honor.

7 THE COURT: Let me hear plaintiffs' counsel on that
8 point.

9 Why isn't it really purchaser we're concerned about?

10 MR. HENN: Because many of the people we're referring
11 to who are likely to be confused are not purchasers of Thom
12 Browne products.

13 THE COURT: They are not at the time. They are
14 prospective, but why aren't they prospective purchasers?

15 MR. HENN: Well, they aren't prospective purchasers --
16 I think you misunderstood my suggested change.

17 The post-sale confusion context is not limited to
18 people who would then -- who would see a Thom Browne product,
19 be confused, and then go visit the Thom Browne store and spend
20 \$2,000 on sweatpants. It's broader than that.

21 This gets to the notion of protecting the public. So
22 my proposal there was to remove both the word prospective and
23 purchasers and replace it simply with the word consumers,
24 because we are not talking about people who would necessarily
25 buy Thom Browne products. We're talking about consumers in the

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1 marketplace who encounter these things in the post-sale
2 environment.

3 MR. HENN: It's --

4 THE COURT: Just read me the exact language that you
5 would have in that entire sentence.

6 MR. HENN: In particular, you should consider what
7 effect the similarity or lack thereof has on consumers and
8 whether any similarity between the parties' designs is likely
9 to cause confusion among consumers.

10 MS. MCKIERNAN: Your Honor, if I may?

11 THE COURT: Go ahead.

12 MS. MCKIERNAN: This goes to the issue of the
13 confusion relating to harm here. The survey evidence that
14 plaintiffs have put on specifically refers to post-sale
15 confusion. It is the harm that would be from a prospective
16 purchaser. That's the exact survey evidence that Mr. Poret put
17 on the stand.

18 MR. HENN: Our harm evidence had nothing to do with
19 purchases. We're not alleging lost sales. In fact, that is
20 why we are seeking a reasonable royalty. Our harm evidence is
21 with regard --

22 THE COURT: Yes, I think plaintiff's counsel is right.
23 I'll make both those changes. Both the prospective purchasers
24 in both places is changed to just consumers.

25 All right. Again, I want to discuss at length the

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1 pre-sale/post-sale, but anything else from defense counsel on
2 instruction number 11?

3 MS. MCKIERNAN: We believe that the sentence under the
4 paragraph that begins with the word sixth, in addition the
5 greater the cost of the product, the more careful the typical
6 consumer could be.

7 We believe this should remain in the instructions.
8 This is specifically requested by plaintiff.

9 THE COURT: I think there is really no evidence to
10 support -- I'm making a factual assertion there it wasn't
11 supported by the evidence. I'm going to strike that sentence.

12 All right. So let's go back to the big issue here, so
13 far as number 11 is concerned, what is the evidence of pre-sale
14 confusion?

15 The survey was limited to post-sale confusion and,
16 therefore, its evidence of who was confused and so forth is so
17 limited.

18 What other evidence was there, what evidence is there
19 anywhere, of pre-sale confusion?

20 MR. HENN: Let me start with the premise of your
21 question which is somehow that a plaintiff must submit survey
22 evidence to be able to allege the claim --

23 THE COURT: No, no, no. I am not asserting that at
24 all. I'm just saying that you cannot use -- in my view, you
25 can't use that survey to show pre-sale confusion.

1 MR. HENN: Fair enough, your Honor.

2 As you know, the survey is only evidence of one of the
3 multiple factors.

4 THE COURT: Absolutely.

5 MR. HENN: So the way the evidence supporting our
6 initial interest claim is evidence that the marks are similar
7 by putting in the marks themselves, evidence that the products
8 are similar because we showed we sell the same kinds of
9 products, significantly the notion that both products appear on
10 social media, which is one of the places initial interest
11 confusion can take place.

12 We also put in the record evidence of how the parties
13 made sales through social media, which means it is an initial
14 interest context. We also have evidence from both parties that
15 these products appear at retail stores together, which allows
16 the jury to assess whether the products are sufficiently
17 competitive, in your Honor's language, or proximate in our
18 language to be confused in that context.

19 We wouldn't be relying on Mr. Poret's survey, but as
20 your instruction suggests, evidence of actual confusion is not
21 required. But I would note that some of our evidence of actual
22 confusion is, in fact, on social media, where people were
23 seeing the social media posts of Thom Browne and responded
24 adidas. And a juror could interpret that as either an example
25 of post-sale confusion because it is when they are out in the

1 marketplace, or because it was on advertisement published by
2 Thom Browne trying to advertise its products, it is evidence of
3 an initial interest confusion. As they were trying to sell the
4 product, the person saw it, they thought it was adidas, they
5 didn't end up buying it. But that's exactly what initial
6 interest confusion is.

7 And then the evidence of bad faith we have otherwise
8 is equally weighable by the jury in the context of a pre-sale
9 decision. So there is no magic evidence that must exist to
10 allege confusion at either the initial interest stage or at the
11 post-sale stage. The jury is permitted to weigh the evidence
12 of each of the *Polaroid* factors in each of the purchase
13 contexts, pre, at the point of purchase, and post.

14 MS. MCKIERNAN: Your Honor.

15 THE COURT: Yes.

16 MS. MCKIERNAN: Your Honor, there is no evidence here
17 of any initial interest confusion. The social media post that
18 plaintiff's counsel is pointing to were described, Mr. Poret
19 described both what would appear in images that would show
20 initial interest or post-sale environment.

21 The social media images that plaintiff's counsel is
22 pointing to are clearly, by their expert's own definition,
23 showing a post-sale environment where those purchases had
24 already been made. And these people are posing and out in the
25 world in the walking on the street, I believe he said, or you

1 could be running in Central Park, might have been his language.
2 Exactly, but those are instances where the environment in those
3 posts are expressly referring to post-sale.

4 MR. HENN: I think I was unclear based on what counsel
5 just said.

6 So my argument, your Honor, is not that the paragraph
7 within the post was in a store because they were obviously
8 taken outside. My point about the social media is that because
9 they are advertisements of the product put out by Thom Browne
10 himself, consumer reactions to that are by definition initial
11 interest confusion examples, because those purchasers have not
12 bought anything.

13 They've seen the ad. They are confused.

14 THE COURT: Yes, I agree with plaintiff, and I think
15 it is really an exercise of the ordinary uses of circumstantial
16 evidence. The jury can draw any reasonable inference from the
17 circumstantial evidence, and so if the evidence is post-sale
18 but the reasonable inference is it would relate equally well to
19 pre-sale, that's an inference they could draw.

20 I do think maybe we should say, on the first item
21 where I'm describing the strength, a mark strength is measured
22 by its tendency to identify the product sold under the mark as
23 associated with a particular company may depend on factors,
24 such as advertising, media coverage, products bearing the
25 marks, sales success, the longevity, and exclusively of the

1 mark's use. Consumer studies, and I would put in here, limited
2 to post-sale --

3 MR. HENN: Your Honor, I think that would be a
4 mistake.

5 THE COURT: I'm sorry?

6 MR. HENN: That would be a mistake. This factor, the
7 first factor is talking about the strength of adidas' mark.

8 THE COURT: All right. But I think my point is this.
9 It may not be there that we put it in, but I think we need to
10 remind the jury that the survey was limited to post-sale.

11 MR. HENN: You can put it in the paragraph beginning
12 fourth. We're actually talking about actual consumers. We had
13 suggested referencing the survey there, and if you wanted to do
14 it, that would be the place to put it. Because the Second
15 Circuit has said survey evidence belongs in the consideration
16 of the actual confusion factor.

17 THE COURT: Let me see if I can try something.

18 MS. MCKIERNAN: Your Honor.

19 THE COURT: Hold on just one second.

20 (Pause)

21 I want to hear from defense counsel more generally,
22 but while it's on my mind, on the fourth element, fourth
23 *Polaroid* factor, I would add the following:

24 Please remember that adidas is only claiming confusion
25 at the pre-sale and post-sale points and that its consumer

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1 survey is limited to post-sale.

2 Any problem with that from the plaintiff's counsel?

3 MR. HENN: No, your Honor.

4 THE COURT: OK. Now let me hear from defense counsel.

5 MS. MCKIERNAN: No objection to that, your Honor.

6 THE COURT: All right. I think we have resolved
7 everything with respect to 11.

8 Let's go on to 12. Now, I must admit that I'm not
9 happy about the fact that I have to give two instructions on
10 dilution, one under federal law and one under state law, when
11 the difference is pretty minor. But the difference is there in
12 the law.

13 However, if plaintiff wanted to waive that difference
14 and just give it as a single instruction -- we'll see what
15 defense counsel would say -- I think that would be a lot easier
16 on the jury here.

17 MR. HENN: Give me one second.

18 THE COURT: Yes.

19 (Counsel confer)

20 MR. HENN: Your Honor, we'll waive the state law
21 claim.

22 THE COURT: OK. This would now be, so instruction
23 number 12 would just be trademark dilution, and we would
24 eliminate what is currently instruction 13.

25 Any problems from plaintiffs with instruction 12?

1 MR. HENN: The only thing we objected to was that the
2 exhibits need to be corrected to 181 and 183 in the third
3 paragraph.

4 THE COURT: I'm sorry.

5 MR. HENN: Sorry. At the end --

6 THE COURT: Line three of?

7 MR. HENN: Third paragraph, bottom line. We just --

8 THE COURT: Oh, thank you so much. That's got to be
9 fixed to be the same as previously.

10 MR. HENN: Yes. Otherwise, we have no objection.

11 THE COURT: OK. Any objection to 12 from defense
12 counsel?

13 MS. MCKIERNAN: Your Honor, on the second page of that
14 instruction where you list the relevant factors, some of the
15 relevant factors.

16 THE COURT: Yes.

17 MS. MCKIERNAN: We would like to include the intent,
18 whether Thom Browne intended to create an association with
19 adidas' mark.

20 THE COURT: Whether Thom Browne?

21 MS. MCKIERNAN: Whether Thom Browne intended to create
22 an association with adidas' mark. The intent factor.

23 THE COURT: So what is the language you would
24 specifically put?

25 MS. MCKIERNAN: Whether Thom Browne intended to create

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1 an association with --

2 THE COURT: I'm sorry. Whether?

3 MS. MCKIERNAN: Whether Thom Browne intended to create
4 an association with adidas' Three-Stripe Mark.

5 THE COURT: All right. I would think plaintiff would
6 be all for that.

7 MR. HENN: It's a statutory factor, your Honor. We
8 don't object.

9 THE COURT: OK.

10 MS. MCKIERNAN: Your Honor, we would also like to add
11 one additional statutory factor.

12 THE COURT: Yes.

13 MS. MCKIERNAN: The extent to which the owner of the
14 famous mark is engaging in substantially exclusive use of the
15 mark.

16 THE COURT: I'm, for some reason, having trouble
17 hearing you.

18 MS. MCKIERNAN: The extent to which the owner of the
19 famous mark is engaging in substantially exclusive use of the
20 mark. It's one of the statutory factors.

21 THE COURT: What does that mean?

22 MS. MCKIERNAN: Whether other people are using three
23 stripes.

24 THE COURT: Ah.

25 MS. MCKIERNAN: There is evidence of third-party use

1 of stripes in the record.

2 THE COURT: Yes. Definitely we have all those
3 photographs of the incredibly heavy dresses that women had to
4 wear in the 19th century. But there is also more recent -- not
5 much more recent stuff -- which of course is what plaintiff
6 will point out -- some more recent stuff.

7 Well, I like your second formulation. Do you want to
8 give that again?

9 The trouble I had with your first formulation is the
10 language is kind of vague.

11 MR. HENN: Maybe use adidas instead of the owner of
12 the famous mark.

13 THE COURT: Whether?

14 MS. MCKIERNAN: Whether other entities are using --

15 THE COURT: Other.

16 MS. MCKIERNAN: Whether third parties are using.

17 THE COURT: Well, it's other producers of similar
18 goods or something like that, right?

19 MR. HENN: It's really an issue of the extent to
20 which, so that is the statutory language.

21 THE COURT: Well, I'm willing to put in something
22 along this. I need some language, though.

23 Let's see. We can figure it out. Whether other.

24 MS. MCKIERNAN: The extent to which other producers of
25 similar goods are using stripes, using...

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1 Yeah.

2 THE COURT: Are you using three stripes just lower
3 case?

4 In other words, not Three-Stripe Mark, but three
5 stripes?

6 MS. MCKIERNAN: Yes, your Honor.

7 THE COURT: OK. I'll put that.

8 All right. On to what is now instruction 14, but
9 which will be now 13, because we're eliminating 13. But
10 anyway, for your purposes, 14 in your draft.

11 Any problems with that from plaintiff's counsel?

12 MR. HENN: Only that it probably -- if you're going to
13 read the headers, I don't know if you are, like Roman numeral
14 III, it should say monetary remedies because we have damages
15 and profits, not just damages.

16 THE COURT: I'm sorry?

17 MR. HENN: At the very top of the page, I have no idea
18 if you're going to read that, where it says Roman numeral III.
19 It said Roman numeral III, damages.

20 As your Honor is aware, we're seeking damages and
21 profits. I would suggest changing that to monetary remedies.
22 And then instead of saying damages generally at the beginning
23 of the instructions --

24 THE COURT: Whoa, whoa, whoa. The jury doesn't know
25 anything about the refinement on damages that is implicit in

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1 your point. They just know that damages means money.

2 MR. HENN: It's fine. You can leave it as damages.

3 I withdraw the objection.

4 THE COURT: I mean, how about this in the first
5 sentence: If you find Thom Browne liable for trademark
6 infringement, you must also determine the amount of money,
7 paren.

8 MR. HENN: No, no. That's fine, your Honor. We
9 weren't objecting to -- this was literally just the titles.

10 THE COURT: I understand the point you're making, but
11 I think for the purposes of the jury --

12 MR. HENN: It doesn't matter.

13 THE COURT: Yes.

14 MR. HENN: We withdraw the objection and have no
15 objection to 14.

16 THE COURT: OK. Any problems with 14 from defense
17 counsel?

18 MS. MCKIERNAN: No, your Honor.

19 THE COURT: All right. 15, any problems from
20 plaintiff's counsel?

21 MR. HENN: I think you should, in the very first
22 sentence after actual damages, you should say I mean instead of
23 is meant.

24 THE COURT: What should I insert me?

25 MR. HENN: Because otherwise it doesn't make sense.

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1 Maybe you can say actual damages means instead of the by.

2 THE COURT: OK. That's OK. Actual damages means.
3 That's good. I like that.

4 MR. HENN: No other objections.

5 THE COURT: OK. Anything from defense?

6 MS. MCKIERNAN: Yes, your Honor.

7 THE COURT: Yes.

8 MS. MCKIERNAN: In the second paragraph, I believe
9 it's the second sentence, it says: If you agree that adidas
10 was harmed by Thom Browne's failure to pay a reasonable
11 royalty.

12 I believe that should be changed to if you would agree
13 that adidas was harmed by the likelihood of confusion or the
14 likelihood of confusion with regard to adidas' Three-Stripe
15 Mark and should have been paid a royalty.

16 THE COURT: No. I think the language I have there now
17 captures, in effect, what the jury has to do, which is they
18 have to determine based on the expert testimony what a
19 reasonable royalty would have been if this had gone to a
20 licensing situation, which is, I think, the standard way this
21 is computed. So I'm going to leave it as is.

22 MR. HENN: I didn't notice that before, but I actually
23 think counsel is correct. And with due respect, your Honor,
24 the standard is not whether the harm was because of failure to
25 pay a royalty, the test is simply was there evidence of harm,

1 period.

2 If there is evidence of harm --

3 THE COURT: Oh, I see. I missed the point.

4 Sorry. Now I understand the point.

5 MR. HENN: So probably we should just end after the
6 word harm.

7 THE COURT: I don't think we need that first. Now
8 that I understand the point you're both making, maybe it should
9 just read as follows, in the second photograph: Adidas does
10 not claim that it lost sales as a result of any infringement by
11 Thom Browne; rather, it contends that its actual damages are
12 measured by the royalties Thom Browne would have paid had Thom
13 Browne sought to use adidas' Three-Stripe Mark and had adidas
14 been willing to license it to Thom Browne.

15 Then I would strike the first part of the next
16 sentence and simply say: you should calculate the damages
17 award using a royalty fee, etc.

18 MR. HENN: That would be fine with us.

19 THE COURT: OK. Very good.

20 All right. Sorry for missing the point on that.

21 How about number 16?

22 MR. HENN: Just two typos, your Honor.

23 Three-Stripe Mark is misspelled in the fourth line
24 down.

25 THE COURT: Oh.

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1 MR. HENN: Lots of Es.

2 THE COURT: I'm sorry.

3 MR. HENN: Similarly, in the second to the last line
4 over on the right.

5 THE COURT: Of the thee.

6 MR. HENN: Of thee credible.

7 THE COURT: This is -- I went to a Quaker college.
8 This is the Quaker pronunciation.

9 But thank you for catching both of those.

10 MR. HENN: No other objections.

11 THE COURT: All right.

12 I want to reraise a point that I mentioned earlier
13 today, but I want to make sure I understand the parties' --
14 I'm sorry. First of all, anything from defense
15 counsel at 16?

16 MS. MCKIERNAN: No, your Honor.

17 THE COURT: OK. So loss profits, in some sense, is
18 discouragement, and discouragement is classically an equitable
19 remedy and, therefore, not to be determined by the jury but by
20 the court.

21 Now, there is language in the statute which sort of
22 finesses this and seems to suggest that the jury can
23 determine -- they don't use those words -- subject to further
24 refinement by the court for equitable reasons or whatever.

25 I'm grateful, as I am sure you are, to congress for

1 giving us that totally ambiguous word, but I do wonder a little
2 bit whether congress should be read to have intended to make
3 discouragement, which is in every other context a purely
4 equitable remedy into something that was determined initially
5 by the jury and then is subject to equitable review, which is
6 the way the statute apparently seems to be have to have been
7 read.

8 Let me hear from plaintiff's counsel and then defense
9 counsel.

10 MR. HENN: That is how the statute has been read
11 repeatedly by the courts. Essentially the way this plays out
12 is the historic distinction between a damages remedy being
13 legal and profits being equitable comes into play at the
14 question of whether there is a right to a jury trial at all.

15 But once there is legal relief being sought, here
16 damages, under the Lanham Act the profits portion also is
17 decided by the jury because you've got the jury there. And the
18 courts then treat that language where it says subject to the
19 principles of equity as a post-trial remittitur or adjustment
20 of any profits that the court deems inequitable.

21 THE COURT: I think I'm stuck with that both from the
22 language and from the case law, although that makes no sense to
23 me in light of all the other cases on discouragement.

24 All right. Any disagreement with any of that by
25 defense counsel?

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1 MS. MCKIERNAN: No, your Honor.

2 THE COURT: All right. Lastly.

3 MR. HENN: Your Honor, just for the record, we should
4 probably state we have no objection to 17 and 18.

5 THE COURT: OK. Well, that's where I was going.

6 MR. HENN: Sorry.

7 THE COURT: Any objection to 17 or 18 from defense
8 counsel?

9 MS. MCKIERNAN: No, your Honor.

10 THE COURT: All right. So here is what we will do. I
11 have a judge's meeting from one to two. I will put in all the
12 changes we have now agreed to, hopefully before I leave for
13 that meeting, but if not my law clerk will bring you, as
14 quickly as possible, the new version, the final version. We
15 will then reconvene at 2:15.

16 I'll also give you a draft verdict form. The only
17 thing I will allow at 2:15 are, in effect, nitpicks, other than
18 as to the verdict form, since that will be the first time you
19 get a chance to see the verdict form.

20 Have a good lunch. I'll see you at 2:15.

21 MS. MCKIERNAN: Your Honor, would we be able to get an
22 electronic copy when the new version is served?

23 THE COURT: If you want to stay here, we'll try to get
24 it to you before one. If you would like, we'll just e-mail it
25 to you.

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1 MR. HENN: E-mail.

2 MR. MALDONADO: E-mail.

3 THE COURT: We'll e-mail to both sides.

4 MS. MCKIERNAN: Thank you.

5 THE COURT: Thanks a lot.

6 MR. MALDONADO: Your Honor, can we discuss briefly the
7 schedule for tomorrow?

8 THE COURT: So tomorrow, as I already told the jury,
9 we'll start at 9:30. The first summation therefore will be
10 over by 11. We'll take a 15-minute break. The second
11 summation, which will then be over by 12:45.

12 We'll give the jury an hour for lunch. We'll bring
13 them back from lunch and give my instructions of law, and then
14 they will start their deliberations.

15 Be sure sometime tonight to put together all the
16 exhibits with an index to exchange between sides so we can send
17 that right in to the jury as soon as I finish my instructions
18 of law.

19 And then as I told them today, if they want to, they
20 can go past 4:30 tomorrow up to seven, if they want to, but
21 they have to tell us by four if that's what they want.

22 OK.

23 MR. MALDONADO: Thank you, your Honor.

24 MR. HENN: Thank you.

25 (Trial continued January 12, 2023 at 9:30 a.m.)

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PLAINTIFF EXHIBITS

Exhibit No. Received

13251244

DEFENDANT EXHIBITS

Exhibit No. Received

128, 163, 164, 165, 431, 432, 433, 434, . . .1200

435, 436, 437, 438, 439, 440,

441, 442, 899, 900, 901, 903,

805 and 897.

[Exhibits]*[received]1242